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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 832

STATE OF OKLAHOMA EX REL. LEON C. PHILIPS, GOVERNOR OF THE STATE OF OKLAHOMA, APPELLANT,

vs.

GUY F. ATKINSON COMPANY, CLEON A. SUMMERS, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF OKLAHOMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED MARCH 11, 1941

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INDEX.

	Original	Print
Record from D. C. U. S., Eastern District of Oklahoma....	a	1
Caption (omitted in printing)	a	1
Complaint	1	1
Exhibit "A"—Map of Red River Denison Dam and Reservoir	14	14
Summons and marshals' returns (omitted in printing)	15	
Affidavit of service on Attorney General of the United States (omitted in printing)	19	
Motion to dismiss	20	15
Minute entry of hearing on motion to dismiss	23	17
Amendment to complaint	24	17
Motion to dismiss	26	19
Memorandum opinion, Rice, J.	29	22
Minute entry of judgment	40	31
Judgment on dismissal	41	32
Petition for appeal	43	33
Assignments of error	45	34
Order allowing appeal	61	40
Bond on appeal, (omitted in printing)	62	
Citation and service, (omitted in printing)	64	
Praeclipe for transcript of record (omitted in printing)	68	
Clerk's certificate, (omitted in printing)	71	
Statement of points to be relied upon and designation of record to be printed.....	72	40

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[fol. a]

[Caption omitted]

[fol. 1]

**IN DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA**

Civil Action No. 348

THE STATE OF OKLAHOMA UPON THE RELATION OF LEON C.
PHILLIPS, Governor of the State of Oklahoma, Plaintiff,

vs.

GUY F. ATKINSON COMPANY, a Corporation under the Laws
of the State of Nevada; Cleon A. Summers, United States
District Attorney for the Eastern District of Oklahoma,
and Curtis P. Harris, Special Attorney Department of
Justice of the United States, Defendants.

COMPLAINT—Filed September 6, 1940

Plaintiff, the State of Oklahoma upon the relation of Leon C. Phillips, the duly elected, qualified and acting Governor of said State, brings this, its complaint, against the defendants, Guy F. Atkinson Company, a Corporation under the laws of the State of Nevada; Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney Department of Justice of the United States, and complains and alleges as follows:

I

That the plaintiff, the State of Oklahoma, is one of the States of the United States of America; that Leon C. Phillips, on whose relation the State of Oklahoma appears herein, is the duly elected, qualified and acting Governor of the State of Oklahoma; that the defendants, Guy F. Atkinson Company, is a corporation organized and existing under and by virtue of the laws of the State of Nevada and is duly authorized to transact business within the State of Oklahoma in accordance with the laws thereof; that Cleon A. Summers is the duly appointed, qualified and acting United States District Attorney for the Eastern District of Oklahoma; that Curtis P. Harris is a resident of the Western District of Oklahoma and has an appointment as

Special Attorney for the Department of Justice of the United States.

That this is a case or controversy of a civil nature between the plaintiff and said defendants, and arises out of [fol. 2] and involves the validity of an Act of Congress of the United States passed and approved on June 28, 1938, being H. R. 10618 (Public No. 761, 75th Congress Chapter 795, 3rd Session) styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes".

That each of said defendants solely and exclusively rely upon said Act of Congress for all matters complained of herein.

That in a certain cause pending in the Supreme Court of the United States styled, State of Oklahoma, complainant, vs. State of Texas, defendant, United States, intervener, 258 U. S. 574, No. 20 Original, decided May 1, 1922, said court settled a controversy then and theretofore existing between the States of Oklahoma and Texas and the United States, with respect to the navigability of Red River as to all matters set forth herein, and with respect to the ownership of the bed of Red River. In said cause it was adjudged and decreed, among other things, that no part of Red River within the State of Oklahoma is navigable. The non-navigability of Red River has remained unaffected since the judgment and decree of said Court as above set forth; and said stream is not now a navigable water of the United States.

That in the case of State of Oklahoma, complainant, vs. State of Texas, defendant, United States, intervener, 260 U. S. 606, No. 18 Original, decided January 15, 1923, said Court settled a controversy then and theretofore existing between the states of Oklahoma and Texas and the United States with respect to the boundary between Oklahoma and Texas. In said cause it was adjudged and decreed, among other things, that the boundary between Oklahoma and Texas, where they are separated by Red River, is along the southern bank of said river. The Court, in said opinion, defines the south bank of Red River in the following language:

"Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it." 260 U. S. 636.

Reference is hereby made to the opinions of the Supreme Court of the United States in the above causes, and to the judgments and decrees entered by it therein, and the same are hereby referred to and made a part of this complaint [fol. 3] as if fully set forth herein; that said opinions by said Court, reported as aforesaid, and the judgments and decreed entered pursuant thereto, are final and binding alike upon this complainant, the State of Oklahoma, the State of Texas, and the United States, and said judgments and decrees have been acted upon and accepted by all parties to said suits.

On June 28, 1938, the Congress passed an Act being H. R. 10618 (Public—No. 761—75th Congress, Chapter 795, 3rd Session) styled:

"An act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes."

A part of said Act refers to the Red River basin being the stream involved in the proceedings referred to in paragraph two hereof. In substance, said Act adopts House Document 541, 75th Congress, 3rd Session, an engineer's report, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, and authorizes and directs the Secretary of War to acquire, in the name of the United States, titles to all lands, easements and rights-of-way necessary for said dam and reservoir project as outlined in said House Document 541; that as outlined in said House Document 541, there is to be constructed at a point some four or five miles northwest of Denison, Texas, and approximately sixteen miles southwest of Durant, Oklahoma, a huge earthen dam some four or five miles in length on and across Red River, by far the greater part of which will be and rest upon Oklahoma soil, and which dam will form a huge reservoir inundating approximately 150,000 acres of land of which

approximately 100,000 acres are located within the State of Oklahoma in the Oklahoma counties of Love, Marshall, Johnston and Bryan; that said dam will impound the waters of Red River and of the Washita River, a tributary of said Red River.

Red River flows in a southeasterly direction and said dam is to be located approximately four miles east or below the mouth of the Washita River, which stream is located entirely within the State of Oklahoma and flows into Red River at a point about two miles above or west of the location of said dam; that said dam, if built as stated, will inundate approximately 100,000 acres of land within the State of Oklahoma the title to which will be taken in the name of the United States; that approximately 3800 acres of said land which will be inundated by said reservoir is owned by plaintiff.

A portion of said land is owned by plaintiff in its sovereign capacity for the use and benefit and for the support and [fol. 4] maintenance of the public or common schools of the State, and a portion of said land is owned by plaintiff for use as a prison farm; that said reservoir will destroy many miles of highways and rights-of-way therefor, belonging to plaintiff; that many bridges belonging to plaintiff will be completely destroyed by said reservoir; that said highways and bridges are devoted to a public use, namely, public travel by the citizens of Oklahoma and other States.

Plaintiff has for many years prior hereto planned, surveyed and built at great monetary cost an integrated and comprehensive system of highways entirely devoted to public use, a part of which system traverses said proposed reservoir both in a northern and southern, and eastern and western direction, and all of said highways and bridges located in said reservoir will be destroyed by the acts and threatened acts of the defendants. Said highways about to be destroyed are strategically located and form vital and important connecting links in the comprehensive and integrated system of State highways owned by plaintiff, the destruction of which will cause plaintiff irreparable injury. That attached hereto and made a part hereof as Exhibit "A" is a true and correct map showing the proposed dam and reservoir; the rivers; and the lands, highways, bridges, subdivisions of government, and boundary of the State of Oklahoma, to be inundated thereby.

That the approximately 100,000 acres of land located within the State of Oklahoma which will be inundated by the reservoir formed by said dam, are principally agricultural lands; that the basin to be inundated is now inhabited by approximately 2000 families, and a total of approximately 8000 people, citizens and residents of plaintiff State; that much of said land is rich soil in a high state of cultivation and is used by the inhabitants thereof for homes and as a means of livelihood; that the lands which will be inundated by said reservoir are, as hereinabove alleged, traversed by many miles of highways; that much of said land has large potential oil reserves and on some of said land there is now located several large producing oil wells, and on some of said land there is now under way extensive drilling and exploration for the production of oil and gas. At this time, by reason of recent oil developments, it — practically certain that at least 15,000 acres of the land to be inundated by the reservoir herein referred to will be, when developed, highly productive of oil and perhaps gas; that [fol. 5] plaintiff derives much of its revenue used for the support of its government, including its university, colleges and eleemosynary institutions from a gross production tax levied on the production of oil and gas; that the taking and inundation of said large acreage of land, from which oil is now and will be produced in large quantities, will cause this plaintiff, as well as its subdivisions of government, a great and irreparable loss in taxable revenues and will seriously interfere with plaintiff in the execution of its governmental functions as one of the States of the American Union; that from recent geophysical and geological surveys, plaintiff believes and, therefore, alleges that at least 50,000 acres of the land to be inundated by the proposed reservoir herein-after described, is underlaid with oil or gas, and that if said reservoir is constructed the same will prevent the production of oil or gas from said land, or at least greatly hinder and obstruct the development to the irreparable damage of plaintiff and its subdivisions of government in the permanent loss of taxable revenues and taxable wealth.

That the annual wealth production accruing to the citizens of plaintiff from the lands which will be inundated from agricultural products is the sum of approximately \$1,500,-

000.00, and in addition said lands produce other large sums of money to plaintiff's citizens who occupy said lands.

The waters of Red River and Washita River are to be impounded as set forth in paragraph 3 hereof, then taken out of plaintiff's domain into the State of Texas, run through conduits located entirely within the State of Texas, and there run through turbines for the generation of electric power for the purpose of sale principally in the area located in and around Dallas and Fort Worth, Texas. The waters thus to be impounded, largely on plaintiff's domain, belong to plaintiff. The taking thereof is without plaintiff's consent and without compensation to it.

That the scheme for said dam and reservoir as projected in said Act and House Document 541 aforesaid, provides for the construction thereof for the purposes of controlling the flood waters of Red River and the Washita River and for the generation of hydroelectric power. Said purposes of flood control and the development of hydroelectric power are under the statutory scheme aforesaid inextricably and inseverably involved. The statutory scheme projects a dam 150 feet in height to spillway elevation, being from tail-[fol. 6] water elevation 510 feet (sea level) to 660 feet. From elevation 510 feet to 590 feet there is to be a dead storage pool for waterpower head. From elevation 595 feet to 620 feet there is to be a water power reservoir. From elevation 620 feet to 660 feet there is to be a flood control reservoir. The flood control reservoir is to be superimposed on the power reservoir, and the power reservoir is to be superimposed on the dead storage reservoir, which dead storage reservoir is to be constructed solely in order to give a head for waterpower. That as set forth in the statutory scheme or authorization act for said project, the first 110 feet in height of the dam is to be used solely and exclusively for the development of waterpower, and the superimposed 40 feet set forth in said statutory scheme is to be used sole-y and exclusively for the impounding and discharge of flood waters; that the statutory purposes for said project are not related to each other except by the

fortuitous circumstance of being at the same location and being purportedly authorized by the same Act.

That as set forth in the statutory scheme or authorization Act, the two purposes for which said reservoir and dam are authorized are functionally separate and neither is the incidental or necessary result of the other; that the waterpower feature of said project is not in aid of or related to the flood control feature thereof except as hereinabove set forth; that the flood control reservoir as projected in said scheme cannot and will not affect the power feature thereof; that the flood control portion of said reservoir can only be used for the impounding and release of flood waters of Red River and Washita River. As set forth in the statutory scheme, the power reservoir will normally be kept full of water. It is no part of said statutory scheme or authorization Act, nor is it physically possible that the same part of the reservoir be used for both flood control and waterpower purposes; that as set forth in the statutory scheme or authorization Act, the waterpower portion of said reservoir is purposefully and separately created at the expense of the utilization for flood control of that part of the reservoir to be used for waterpower.

That as set forth in the authorization Act, the Secretary of War and the Chief of Engineers have power to modify the statutory scheme or plan for said dam and reservoir; that the actual plans for the construction of said dam and reservoir provide for said project to be constructed at the following pool levels:

[fol. 7] 510 feet (sea level) tailwater elevation to 567 feet for dead storage for water head

587 feet to 617 feet for power pool reservoir

617 feet to 640 feet for flood control reservoir

That by reason of the modification of the statutory scheme as aforesaid, said project has been changed from a reservoir inundating 3,400,000 acre-feet for power, and 5,900,000 acre-feet for flood control as provided therein, to one for a reservoir inundating 3,080,000 acre-feet for power, and 2,745,000 acre-feet for flood control. In percentage, as set forth in the statutory scheme and authorization Act, 75% of the height of the dam is for power and 25% for flood control. As the plans for said project have been modified by the defendant and Chief of Engineers, 82% of the height of the

dam is for power, and 18% for flood control. As set forth in the statutory scheme or authorization Act, 37% of the acre-feet inundated is for water storage for power, and 63% for flood control. As the plans have been modified as aforesaid, 53% of the acre-feet inundated is for water storage for power, and 47% for flood control. That by reason of the acts as aforesaid, the statutory scheme or authorization Act has been changed from one preponderantly for flood control to one preponderantly for the development of water power.

Plaintiff further shows to the court that the defendant, Guy F. Atkinson Company, a corporation, purporting to act under a contract with the Secretary of War or the Board of Army Engineers or the Chief of Army Engineers, has now located on the Oklahoma side of the proposed dam as aforesaid a great number of machines consisting of trucks, tractors, steam shovels, drag lines and other equipment for the removal of earth, rock and gravel and is now engaged in the construction of the dam across Red River at the proposed location hereinabove set forth which dam will, when built, be of the height as hereinabove set forth and will impound the waters of Red River and the Washita in the aforesaid reservoir thereby inundating and destroying approximately 100,000 acres of land located within the domain of plaintiff of which approximately 3800 acres are owned by plaintiff in its sovereign capacity as hereinabove alleged; that the building of said reservoir will permanently and totally destroy the lands owned by plaintiff including valuable mineral rights underlying the same for which it has not [fol. 8] received compensation, and will totally and permanently destroy the lands owned by plaintiff's citizens, render impossible or very expensive the development of oil and gas underlying and which is now being produced from a large acreage of said land thereby destroying plaintiff's revenues, and the revenues of its subdivisions of government; that said defendant, Guy F. Atkinson Company solely and exclusively relies for the validity of its contract as aforesaid upon the Act of Congress hereinabove mentioned and set forth.

That the defendant, Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and the defendant, Curtis P. Harris, Assistant to the Depart-

ment of Justice of the United States of America, have already instituted numerous condemnation suits in this court for the purpose of acquiring the title to various tracts of land within the proposed reservoir, and said defendants now propose and intend to institute numerous additional condemnation suits for the purpose of acquiring additional lands in said proposed reservoir, which lands so acquired and which said defendants intend to acquire are located within the domain of plaintiff.

That plaintiff has at no time given its consent to the acts and proposed acts of said defendants but on the contrary has made numerous protests to the Secretary of War having charge of the construction of said dam and reservoir, of which protests and objections said defendants have actual notice.

That as a direct and proximate result of the acts of said defendants in the manner aforesaid plaintiff will suffer irreparable damage and injury substantially as follows:

(a) The taking and inundation of said lands will seriously affect, if not destroy, numerous subdivisions of government of plaintiff in this, to-wit: The land sought to be taken and which will be taken as a result of the acts of said defendants unless enjoined by this Court, is located in the counties of Love, Marshall, Johnston and Bryan which are duly organized and existing counties of plaintiff State.

Within the affected area in said counties are thirty-nine duly and legally organized and existing school districts and townships. Said counties, school districts and townships are supported largely by a levy of advalorem taxes on the real estate and personal property located within the boundaries of such counties, townships and school districts; that [fol. 9] the taking of said approximately 100,000 acres of land will greatly decrease the taxable property in each of the counties aforesaid, and in many of the townships and school districts in each of said counties will virtually take all of the taxable property therein that each of said counties, townships and school districts affected have large bond indebtedness, which bonds were issued pursuant to the constitution and laws of plaintiff State; that the bond indebtedness is not a fixed lien on the property of the various subdivisions but is payable from an annual levy of taxes against the taxable property thereof; that if said taxable

property is taken and destroyed by the acts of the defendants as hereinabove set forth, said counties, townships and school districts will be deprived of much of the tax revenue for the support thereof so that in many instances said subdivisions of government will be practically if not entirely destroyed, and as to those not entirely destroyed, the same will be seriously hampered in carrying out the functions of government for which said subdivisions were created. As to many of such subdivisions, if said dam is built and thereby the reservoir is created and said lands inundated, sufficient revenue cannot be obtained to carry on government therein.

That on the basis of 1939 tax levies, the taking of the land alone with no consideration thereof given for the loss of oil revenues, revenues from agriculture and stock raising, other revenues from personal property taxation, the net taxable loss to the subdivisions of government concerned will be approximately \$40,000.00 per year.

(b) That the acts and threatened acts of the defendants in the manner aforesaid are a direct invasion and destruction of the sovereign, quasi sovereign, territorial and proprietary rights of the plaintiff in this, to-wit:

(1) That the construction of said dam will create a huge reservoir of water overflowing and obliterating the present distinguishable banks of Red River. The waters of said reservoir will extend far past the south bank of Red River into the State of Texas, and far north of the north bank of said river into the State of Oklahoma; that the boundary of plaintiff will be obliterated for approximately 40 miles and cannot be determined except perhaps by some method of triangulation and will exist, if at all, only theoretically and not actually. Plaintiff will be compelled to surrender its jurisdiction of the territory to be inundated, and will thereby [fol. 10] be deprived of not only its established boundary but many thousand acres of its best land, which will be in effect a forcible reduction of the area of plaintiff as one of the United States.

(2) That the lands owned by the plaintiff in fee simple will be taken and its proprietary rights therein will be extinguished.

(3) Plaintiff's highways, including the rights-of-way thereof, will be destroyed; its bridges will be destroyed; its means of communication between various sections of Oklahoma will be interrupted and in a large measure destroyed, which highways are of vital importance to plaintiff and its

citizens and form an important part of its integrated and comprehensive system of roads used for the conduct of trade and travel within its borders.

(4) The waters of the Washita and the Red River, owned by plaintiff, will be taken from it in violation of its laws without the payment or offer of just compensation for the taking thereof.

(5) The acts of said defendants will divert the waters of Red River and the Washita into another State for the purpose of being used and appropriated by authorities other than that of plaintiff and those acting under it or by its authority, for the purpose of generating hydroelectric power to be sold on the available market without compensating plaintiff therefor notwithstanding said waters belong to plaintiff.

(6) The approximately 100,000 acres of land located within the boundary of plaintiff to be taken for said project are now thickly populated by the citizens of plaintiff who use the same for homes and as a means of making a livelihood. The taking of said land will oust the citizens of plaintiff therefrom, making it necessary for such citizens to seek other and new homes. The removal of such citizens from said land will create a serious social and economic problem, the burden of which will fall largely upon plaintiff, for which no measure of compensation is afforded or offered.

Plaintiff further shows to the Court that said defendants are without lawful power or authority, under the Act aforesaid, or by virtue of any authority conferred upon them by those who purport to act thereunder, to institute proceedings for the condemnation of land located within the borders of plaintiff including that owned by it, construct said dam for the creation of said reservoir which will destroy its highways, right-of-way therefor and bridges, obliterate its distinguishable boundary, oust its citizens from their homes, [fol. 11] hamper and destroy its subdivisions of government and take from plaintiff its jurisdiction and authority over said property; that said Act of Congress, as same is being applied and as the same is sought to be applied and enforced by the defendants and under which they are acting in the premises aforesaid, and upon which they exclusively and solely rely for their acts, is beyond the power of the

Congress to enact, and is unconstitutional and void in that the same contravenes the rights and powers of plaintiff reserved to it by the Tenth Amendment of the Constitution of the United States; that said project and scheme, as outlined and set forth in said Act and in House Document 541 as aforesaid, are not for a public purpose and are not within the powers of Congress, express or implied, conferred by the Constitution of the United States by Section 8, Article 1, or any other provisions thereof; that said acts and threatened acts of said defendants constitute an unlawful invasion and destruction of the sovereign, quasi sovereign, territorial and proprietary rights of plaintiff reserved to it and protected by the Tenth Amendment of the Constitution of the United States. By reason of the foregoing, said defendants, in their acts and threatened acts in so far as the same invade and destroy the rights of plaintiff as hereinabove alleged, are acting and threatening to act in excess of legal or constitutional authority; notwithstanding which said defendants intend and purpose to, and will, unless enjoined by this Court, commit and perform said illegal and void invasion and destruction of plaintiff's property, domain, boundary and sovereign and quasi sovereign rights. In so doing, said defendants and those for whom they purport to act solely and exclusively rely upon the purported void and unconstitutional Act of Congress aforesaid.

That plaintiff has no plain, complete nor adequate remedy at law for the preservation of its sovereign, quasi sovereign, territorial and proprietary rights which are about to be unlawfully invaded and destroyed by said defendants in the manner aforesaid.

Wherefore, Plaintiff prays:

(1) That the defendant, Guy F. Atkinson Company, a corporation, its agents, servants and employees be permanently restrained and enjoined from:

(a) Constructing any dam across Red River within the domain of plaintiff which would impound the waters of Red River or Washita River in so far as said waters, when impounded, would inundate and destroy any of the lands, highways or bridges belonging to plaintiff or under its jurisdiction and control as a sovereign State, or

(b) Which waters would, if impounded, obliterate, change or interfere in any way with the boundaries of plaintiff.

(2) That defendants, Cleon A. Summers, United States District Attorney, and Curtis P. Harris, Special Assistant Department of Justice of the United States, be enjoined and restrained from instituting or conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by plaintiff or located within its domain for the purpose of obtaining a site or right-of-way for said dam or the reservoir to be created thereby in so far as said lands sought to be thus acquired are to be used in the construction of the dam and reservoir hereinabove described and set forth and purporting to be authorized by the Act of Congress as aforesaid.

(3) That plaintiff have temporary and such other and further relief special and general as it shall be entitled to receive under the facts alleged and *and* the law applicable thereto.

The State of Oklahoma, Plaintiff, by Mac Q. Williamson, Attorney General of the State of Oklahoma; Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Okla.; C. C. Hatchett, of Durant, Oklahoma; Wm. O. Coe, of Oklahoma City, Oklahoma, of Counsel, 606-608 Braniff Bldg., Attorneys for Plaintiff.

Duly sworn to by Leon C. Phillips, jurat omitted in printing.

[fol. 13] [File endorsement omitted.]

(Here follows 1 photolithograph, side folios 14-19)

135

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"Exhibit A"

MAP
of
RED RIVER
SHOWING
DENISON DAM AND RESERVOIR

LEGEND

- STATE SCHOOL LAND
- STATE INSTITUTIONAL LAND
- SCHOOL DISTRICTS
- RESERVOIR AT SPILLWAY ELEVATION 640'
- STATE & FEDERAL

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[fol. 20] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 30, 1940

Guy F. Atkinson Company, a corporation, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney of the Department of Justice of the United States, defendants in the above-entitled cause, appearing herein by Norman M. Littell, Assistant Attorney General of the United States, and Charles O. Butler, Attorney, of the Department of Justice of the United States, jointly and severally respectfully move the court as follows:

I

To dismiss this action on the ground that this court is without jurisdiction to proceed with the hearing of this case because; (a) this suit is in reality a suit against the United States of America without its consent; (b) no consent has or can be given by the United States to the institution of this suit; (c) the real controversy herein is between the State of Oklahoma, acting at the relation of its Governor on the one hand, and the United States of America on the other; and (d) the Hon. Henry L. Stimson, Secretary of War of the United States, is a necessary and indispensable party to these proceedings and has not been made a party herein.

II

To dismiss this action because the complaint fails to state a claim against these defendants upon which relief can or should be granted by a court of equity, it appearing from the face of said Complaint; (a) that the Act of Congress challenged as unconstitutional by the plaintiff in these proceedings, and upon which these defendants rely and defend, is, as a matter of Law, a legal, valid, and constitutional enactment of the Congress of the United States, under powers expressly and impliedly conferred and therefore fully sanctioned and warranted by the Constitution of the United States; (b) that these defendants, and each of them, are legally, validly, and constitutionally executing said Act of Congress in the performance of the acts or duties required of these defendants, and each of them, under said Act and under the law; (c) that the alleged injuries to the plaintiff herein are not such injuries as are irreparable nor such in-

juries as are not incidental to the valid, legal, and constitutional execution of said Act of Congress of the United States, nor such injuries as warrant the relief sought by a court of equity; (d) that such alleged injuries are incidental to the exercise of the inherent sovereign right of the United [fol. 21] States to carry into execution a valid, legal, and constitutional enactment of the Congress of the United States, and to institute, maintain, and prosecute eminent domain or condemnation proceedings to acquire all necessary lands, easements, rights-of-way, or property, public or private, in the execution of said Act of Congress; (e) that the plaintiff herein has a plain, complete, and adequate remedy at law whereby to find redress for said alleged injuries, and whereby to protect its alleged sovereign quasi-sovereign territorial and proprietary rights in the premises in readily available, recognized, and well established actions or proceedings at law; (f) that the Act of Congress here involved, and House Document 541, 75th Congress, Third Session, adopted under said Act, are matters of which this court takes judicial notice and have become, by direct reference thereto, a part of the Complaint filed herein, and that said Act and said House Document 541, so enacted by the Congress of the United States, legally, validly, and constitutionally authorizes, warrants, and directs the proper execution thereof, and that it is apparent, from said Complaint, when considered and interpreted in the light of said Act and said House Document 541, that these defendants, and each of them, have committed or performed no act or duty not legally, validly, and constitutionally authorized, warranted, and directed under said Act and said House Document 541.

Wherefore, defendants, and each of them, jointly and severally, move that this action be dismissed.

Norman M. Littell, Asst. Attorney General of United States Department of Justice, Washington, D. C.
Charles O. Butler, Attorney, Department of Justice, Washington, D. C. Cleon A. Summers, United States Attorney, Eastern District of Oklahoma, Muskogee, Oklahoma.

[File endorsement omitted.]

Affidavit of Service

United States of America,
Eastern District of Oklahoma, ss:

Charles O. Butler, of lawful age, being first duly sworn, on oath states that on the 30th day of September, 1940 he served the above, foregoing and attached Motion to Dismiss upon the plaintiffs by mailing a true and correct copy of said Motion to Dismiss to Mac Q. Williamson, Attorney General of the State of Oklahoma, at Oklahoma City, Oklahoma.

Charles O. Butler.

[fol. 22] Subscribed and sworn to before me this 30th day of September, 1940. W. V. McClure, Clerk, U. S. District Court. (Seal.)

[fol. 23] IN UNITED STATES DISTRICT COURT

MINUTES AND ORDERS OF THE COURT MADE AND ENTERED ON
THE 28TH DAY OF OCTOBER, 1940, AT THE HEARING HELD AT
DURANT, OKLAHOMA ON THE MOTION TO DISMISS.

Said cause comes on for oral argument on motion to dismiss of deft., plaintiff appearing by Mr. Randell S. Cobb, Mr. C. C. Hatchett, and Mr. Wm. O. Cope; Deft appearing by Mr. Charles O. Butler, Mr. Finley J. Gibbs and Mr. Cleon A. Summers.

Entered order granting Plff., 10 days from this date within which to file amendment to its complaint if it so desires and directing Defendant to file brief on its Motion to dismiss within 30 days from expiration of time of Plff., for filing amendment and directing Plf., to file its answer brief within 20 days thereafter.

[fol. 24] IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed November 2, 1940

Now, comes the above named plaintiff, leave of Court being first had, and says:

That during the oral argument of the defendants' motion to dismiss had before this Court in Durant, Oklahoma, on

October 28, 1940, the attention of the Court was called to Section 4 of H. R. 9972, 76th Congress, 3rd Session, passed by Congress, and approved by the President on October 17, 1940; that at the time of the filing of this suit said Act had not been passed; that Section 4 of said Act is unconstitutional and void on all the grounds set forth in the Complaint filed herein, the allegations of which are reaffirmed as to said Action 4; that in so far as said Section 4 of said Act attempts to declare the project for the Denison reservoir on Red river in Texas and Oklahoma authorized by the Flood Control Act approved June 28, 1938, to be for the purpose of improving navigation, or regulating the flow of Red river or for other beneficial uses, the same is without factual bases and, in effect, is only a self-serving Congressional declaration; that the project set forth and described in plaintiff's Complaint does not in any way protect or improve the navigable portions of the lower reaches of Red river or of the Mississippi river either by enriching the low water flow of said rivers as the incidental result of the operation of said flood control and hydroelectric power project, except in the intangible, indirect, inconsequential and unsubstantial way set forth and described in House Document 541, 75th Congress, 3rd Session; and that said project so outlined and adopted by Congress has no tangible, direct, immediate or consequential effect either for the improvement of navigation or for regulating the flow of Red river, or for other beneficial uses save and except as set forth and described in the aforesaid statutory scheme; that said Act of Congress does not and cannot effect the findings and decrees set forth in the case of Oklahoma v. Texas, United States, Intervenor, set forth and described in the Complaint.

That the sole and only purposes of said project are those set forth in the Authorization Act and described in the statutory scheme aforesaid for flood control and hydroelectric power, neither of which has any real or substantial relation to the improvement of navigation of the navigable portions of Red river or of the Mississippi river; such inconsequential and intangible benefits to navigation as may result from said project, would flow from this flood control feature thereof and not the hydroelectric feature thereof.

[fol. 25] Wherefore, Plaintiff prays for judgment in accordance with the prayer of its Complaint.

The State of Oklahoma, Plaintiff, By Mac Q. Williamson, Attorney General of the State of Oklahoma; Randell S. Cobb, First Asst. Atty. General of the State of Oklahoma; C. C. Hatchett, of Durant, Oklahoma; Wm. O. Coe, of Oklahoma City, Oklahoma, of Counsel, Attorneys for Plaintiff.

Affidavit of Mailing

State of Oklahoma,
Oklahoma County, ss:

Della Baldwin, being duly sworn upon oath, deposes and says that on the 1st day of November, 1940, she enclosed a copy of the attached Amendment to the Complaint in an envelope addressed to:

Honorable Chas. O. Butler, Assistant Attorney General of the United States, 2127 Lands Division, Department of Justice, Washington, D. C., and to Honorable Cleon A. Summers, United States District Attorney, Washington, D. C.,

with postage thereon fully prepaid, and deposited the same, in the United States post office at the State Capitol, in Oklahoma City, Oklahoma.

Della Baldwin.

Subscribed and sworn to before me this 1st day of November, 1940. Lonnelle Allen, Notary Public.
My commission expires January 7, 1941. (Seal.)

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 7, 1940

Guy F. Atkinson Company, a corporation, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney of the

Department of Justice of the United States, defendants in the above-entitled cause, appearing herein by Norman M. Littell, Assistant Attorney General of the United States, and Charles O. Butler, Attorney of the Department of Justice of the United States, jointly and severally respectfully move the court as follows:

I.

To dismiss this action on the ground that this court is without jurisdiction to proceed with the hearing of this case because (a) this suit is in reality a suit against the United States of America without its consent, (b) no consent has or can be given by the United States to the institution of this suit, (c) the real controversy herein is between the State of Oklahoma, acting at the relation of its Governor on the one hand and the United States of America on the other, and (d) the Honorable Henry L. Stimson, Secretary of War of the United States, is a necessary and indispensable party to these proceedings and has not been made a party herein.

II.

To dismiss this action because the complaint as amended fails to state a claim against these defendants upon which relief can or should be granted by a court of equity, it appearing from the fact of said complaint as amended: (a) that the Acts of Congress challenged as unconstitutional by the plaintiff in these proceedings, and upon which these defendants rely and defend, are, as a matter of law, legal, valid and constitutional enactments of the Congress of the United States, under powers expressly and impliedly conferred and therefore fully sanctioned and warranted by the Constitution of the United States; (b) that these defendants, and each of them, are legally, validly and constitutionally executing said Acts of Congress in the performance of the acts or duties required of these defendants, and each of them, under said Acts and under the law; (c) that the alleged injuries to the plaintiff herein are not such injuries as are irreparable nor such injuries as are not incidental to the valid, legal and constitutional execution of said Acts of Congress of the United States, nor such injuries as warrant the relief sought by a court of equity; (d) that such alleged injuries are incidental to the exercise

[fol. 27] of the inherent sovereign right of the United States to carry into execution a valid, legal and constitutional enactment of the Congress of the United States, and to institute, maintain and prosecute eminent domain or condemnation proceedings to acquire all necessary lands, easements, rights of way, or property, public or private, in the execution of said Acts of Congress; (e) that the plaintiff herein has a plain, complete and adequate remedy at law whereby to find redress for said alleged injuries, and whereby to protect its alleged sovereign, quasi-sovereign, territorial and proprietary rights in the premises in readily available, recognized, and well established actions or proceedings at law; (f) that the Acts of Congress here involved, and House Document 541, 75th Congress., 3d Sess., adopted under said Acts, as modified and amended, are matters of which this court takes judicial notice and have become, by direct reference thereto, a part of the complaint filed herein, as amended, and that said Acts and said House Document 541, as modified and amended, so enacted by the Congress of the United States, legally, validly and constitutionally authorize, warrant and direct the proper execution thereof, and that it is apparent, from said complaint, as amended, when considered and interpreted in the light of said Acts and said House Document 541, as modified and amended, that these defendants, and each of them, have committed or performed no act or duty not legally, validly and constitutionally authorized, warranted and directed under said Acts and said House Document 541, as modified and amended.

Wherefore, defendants, and each of them, jointly and severally, move that this action be dismissed.

Norman M. Littell, Assistant Attorney General of the United States, Department of Justice, Washington, D. C. Charles O. Butler, Attorney, Department of Justice, Washington, D. C.

Cleon A. Summers, United States Attorney, Eastern District of Oklahoma, Muskogee, Oklahoma.

[File endorsement omitted.]

[fol. 28] PROOF OF SERVICE OR COPY OF MOTIONS TO DISMISS

Charles O. Butler upon being first duly sworn, deposes and says that he served a true and correct copy of the

Motions to Dismiss of the defendants in the above-entitled cause upon Mac Q. Williamson, Attorney General of the State of Oklahoma; C. C. Hatchett of Durant, Oklahoma; and William O. Coe of Oklahoma City, of counsel for the plaintiff in said cause, by depositing said copy of said motions in the United States Post Office, postage prepaid, at Muskogee, Oklahoma, directed to said counsel at their respective addresses appearing from the records in said case.

Charles O. Butler.

Subscribed and sworn to before me this 9th day of December, A. D. 1940. W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma. By Ellis Quiett, Deputy.
(Seal.)

[File endorsement omitted.]

6 [fol. 29] IN UNITED STATES DISTRICT COURT

Before Huxman and Murrah, Circuit Judges, and Rice,
District Judge

MEMORANDUM OPINION—Filed February 8, 1941

RICE, District Judge:

By this action the State of Oklahoma, upon the relation of Leon C. Phillips, Governor, challenges the right of the defendants to proceed with the construction of what is commonly known as the Denison Dam. The dam is now in the process of construction across Red River near Denison, Texas, and from a point in Bryan County, Oklahoma. The defendant, Guy F. Atkinson Company, a corporation, is the contractor and it is charged in the bill of complaint that he is purporting to act under a contract with the Secretary of War. The defendant, Cleon A. Summers, is the United States District Attorney for the Eastern District of Oklahoma. Curtis P. Harris, defendant, is a Special Attorney for the Department of Justice of the United States. As to the latter two defendants, it is charged that they have already instituted numerous suits for the condemnation of lands within the proposed area of the dam, and, unless

enjoined, will institute other suits for the condemnation of lands within the State of Oklahoma. The plaintiff further alleges that the defendants are proceeding under a certain act of Congress passed and approved on June 28, 1938, [fol. 30] being H. R. 10618, public No. 761, 75th Congress, chapter 795, 52 Stat. 1215, styled "An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes", and that this Act of Congress is unconstitutional and void, contravening powers reserved to the plaintiff by the Tenth Amendment; that it is wholly beyond the power of Congress to enact; that the project and scheme as outlined in the Act authorizing its construction and in House Document No. 541 referred to in the Act are not for a public purpose and are not within either the expressed or implied powers of Congress.

Other allegations contained in the plaintiff's bill are that if the dam is constructed as contemplated, it will inundate approximately one hundred thousand acres of lands within the State of Oklahoma, much of which land is owned by the State of Oklahoma in fee simple; that it will destroy many of the highways of the State of Oklahoma; that it will compel eight thousand residents of the State of Oklahoma to move; that it will seriously affect political subdivisions of the State of Oklahoma, both counties and school districts in that much of the lands situated in such subdivisions will be taken; that much of the lands within the area affected are oil producing lands and that the building of the dam will seriously effect the development of these oil lands and will deprive the State of Oklahoma of much revenue to be derived from the gross production tax on the oil and gas that might be produced; and that the impounding of the waters behind said dam would cover lands in both the State of Texas and the State of Oklahoma and would thereby obliterate the boundary line between the two states; that under the plan it is contemplated that waters from both the Red River and the Washita River, a non-navigable tributary of the Red River wholly within the State of Oklahoma, are to be impounded and thereafter conducted through conduits into the State of Texas and there conducted through turbines for the purpose of generating electrical power; that the plan for the construction of said dam as disclosed in House Document 541 contemplates the construction of a dam for both flood control purposes and

for the purpose of the generation of hydroelectric power; that the two purposes are functionally separate and neither [fol. 31] is incidental or a necessary result of the other; that the electric power feature is not in aid of nor related to flood control; that Red River within the State of Oklahoma is a non-navigable stream; that the non-navigability of Red River within the State of Oklahoma was determined by the Supreme Court of the United States in the case of State of Oklahoma, complainant, v. State of Texas, defendant, United States, Intervener, 258 U. S. 574, decided May 1, 1922.

The prayer of the plaintiff's bill of complaint is that the contractor, Guy F. Atkinson Company, its agents, servants and employees be permanently restrained and enjoined from constructing the dam in question and that the defendants, Cleon A. Summers and Curtis P. Harris be enjoined and restrained from instituting and conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by plaintiff or located within its domain for the purpose of obtaining a site or right-of-way for said dam or the reservoir to be created thereby.

The defendants, represented by the Department of Justice of the United States, have filed a motion to dismiss. This motion to dismiss presents, first, the jurisdiction of the court to entertain this suit, and, second, appropriately raises the constitutionality of the Act of Congress involved. The accepted procedure for presenting this constitutional question — by motion to dismiss. Arizona v. California, 283 U. S. 423; Steward Machine Company v. Davis, 301 U. S. 548; New Jersey v. Sargent, 269 U. S. 328.

At the threshold we are met with the objection to jurisdiction. Defendants contend that the government is the real party in interest, and, its consent not having been given, it may not be sued, and that the Secretary of War is an indispensable party. The immunity of the government from suit, to which it has not consented, is a principle too well established to require citation of authority. Is this a suit against the government? On the face of the pleadings it is not. The plaintiff is proceeding against the individual defendants on the theory that the Act of Congress under which they are admittedly acting is unconstitutional. Although there may be some slight apparent conflict in the decisions, we think it is fairly well estab-

lished that if an agent of the government acts without authority or attempts to act under a void or unconstitutional [fol. 32] Act of Congress, he ceases to act in an official capacity and a suit against him is not a suit against the government, in such case the theory or fiction, if we would call it such, being that the government can act only under constitutional authority. It follows that the exemption of the government from suit does not exempt or protect its officials from being sued when they are proceeding without authority or under an unconstitutional Act of Congress. Otherwise, there would be no constitutional limitations, since there would be no way of testing the constitutionality of the challenged procedure. *Philadelphia Company v. Henry L. Stimson, Secretary of War*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82; *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. A. 381; *Ryan v. C. B. & Q. Railroad*, 59 Fed. (2d) 137; *Franklin Township v. Tugwell, Administrator of Resettlement Administration*, 85 Fed. (2d) 208; *United States v. Lee*, 106 U. S. 196.

If the Act of Congress is unconstitutional, then the Secretary of War is not a necessary party. *Colorado v. Toll*, 268 U. S. 228; *Missouri v. Holland*, 252 U. S. 416; *Ryan v. Amazon Petroleum Corporation*, 71 Fed. (2d) 1. In *Colorado v. Toll*, supra, the court says: "The object of the bill is to restrain an individual from doing acts that is alleged he has no authority to do and that derogate from the quasi-sovereign authority of the state. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining his superior officers of the United States". It would seem, therefore, that if the Act is unconstitutional, the authorities sustain the right of the state to maintain the action, the appropriateness of injunctive relief, that it is not a suit against the United States, that the Secretary of War is not a necessary party. And, since the Act of Congress in question is challenged by the plaintiff as unconstitutional, and the constitutionality of the said Act is asserted by the defendants, who are within the jurisdiction of this court and have been served by proper process, this court has jurisdiction to entertain the suit and must of necessity determine or pass upon the constitutionality of the Act. The question and the manner in which it is presented, rather than the ultimate answer, determine jurisdiction.

[fol. 33] The motion to dismiss admits all facts well pleaded. It does not admit conclusions of law or deductions of fact not warranted. Most of the allegations of Plaintiff's complaint are immaterial in so far as the constitutionality of the Act in question is involved. Upon oral argument the attorneys for the plaintiff conceded that if the Act of Congress in question is constitutional, the motion of the defendant to dismiss should be sustained. They further admitted that in the determination of the constitutionality of the Act, assuming the truth of all well pleaded allegations, no evidence was necessary or proper. They further admitted upon oral argument and in their brief that if the Act is constitutional, the government may acquire any and all lands by condemnation proceedings, even the lands of the State of Oklahoma, needed in the construction of this project. The sole question therefore, before the court upon this motion to dismiss is whether or not the Act is constitutional.

The contention of the plaintiff is that the construction of this dam has no relation to navigation; that the Act of Congress originally provided for a dam for two purposes, to wit: flood control and hydroelectric purposes; and that the inclusion of the hydroelectric feature rendered the entire Act unconstitutional; that it would not be necessary for the court to pass upon whether or not the dam could be built for flood control purposes, since the inclusion of the hydroelectric feature would in all events render the Act unconstitutional for the reason that the government may not impound the waters of a non-navigable portion of a stream even for a lawful purpose and thereafter use the waters impounded for generating electric power.

The Act of Congress of June 28, 1938, under which the defendants are proceeding is entitled "An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes" 52 Stats. 1215. This is a comprehensive Act dealing with flood control projects in many parts of the United States. The declared purpose of the Act, as contained in Section 4, is "that the following works or improvements for the benefit of navigation and control of destructive floods, and other [fol. 34] purposes, are hereby adopted and authorized * * *". In the original Act, after a statement of general purpose contained in Section 4, with specific reference to the Denison Dam, the following language is used: "The Deni-

son Reservoir on Red River in Texas and Oklahoma, for flood control and other purposes, as described in House Document No. 541, 75th Congress, 3d Session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000.00". By an Act approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3d Session, in Section 4 thereof Congress declared: "The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods, and for other beneficial uses". This last Act of Congress the plaintiff designated as no more than a self-serving declaration by Congress. This Act was passed by Congress with a full knowledge of the changes made in the plans as described in House Document 541, and may be considered as a ratification of the changes and modifications. It further reaffirmed the purpose of Congress in authorizing the construction of the dam. It might be observed that the declared purpose in the Act of October 17, 1940, is in no substantial particular different from that of Section 4 of the Act of June 28, 1938. It is merely a bit more specific. There is no substantial difference between "benefit of navigation" and the more specific statement "purpose of improving navigation, regulating the flow of Red River". In substance they mean the same. It seems further that the purposes as set forth in Section 4 of the Act of 1938 apply to all of the projects contained in the said Act, even though Congress in making the specific reference to the Denison Dam used the language "for flood control and other purposes". Certainly the Act of October 17, 1940, would remove any doubt that might exist by reason of the use of the particular language in the Act of 1938.

[fol. 35] The plaintiff in this case in effect asks the court to determine that the purposes of the dam are not those that Congress has said them to be. Much time is given in the brief filed herein to a discussion of the evidence before the Congressional committee and to the report contained in House Document 541. The argument is made that in fact this dam will not be an aid to navigation or commerce. While House Document 541, in a summary of the benefits to navigation, contains the statement that present or prospec-

tive commerce on the navigable portion of Red River would not justify the cost involved in the construction of the dam, it states "The construction of the Denison Reservoir would have a favorable effect on open channel navigation by reducing flood stages and increasing low water flows (page 68)". Again on page 72 it is said "In the event that at some future time prospective commerce should justify a navigation system, it is believed such a system would consist of reservoirs operated in conjunction with a series of locks and dams. If this contingency should materialize the proposed Denison Reservoir, located above the navigable portion of the river, would fit into such a general scheme of improvement". House Document 541 discusses flood control, benefits to interstate commerce, and the damaging effect of floods upon interstate commerce; and, after consideration of all the facts before it, Congress enacted the particular legislation for the purposes set forth in the Act itself. It is not for courts to go behind the expressed purpose of an Act of Congress and say that it was not enacted for that purpose as long as the means provided are not unrelated to the expressed objects of the legislation. *Arizona v. California*, 283 U. S. 423; *Aslwander v. T. V. A.*, 297 U. S. 288.

The power of the United States government over waters is not limited to control of navigation. In the recent case of *United States v. Appalachian Electric Power Company*, decided December 16, 1940, the court uses this language. "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the water-[fol. 36] way itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. *Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.*" (Emphasis ours.) It is true that in the Appalachian case, supra, the court determined that the river was in fact navigable. It is well settled, however, that in the exercise of its control the government is not limited in its activity to that portion of a stream which is in fact navigable if the stream in general is a navigable stream, as is the Red River in its lower parts. *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, 703. It is also well settled that the government may construct a

dam and power project on the non-navigable portion of a stream for the purposes of controlling floods in the navigable portions of the stream below the dam. *United States v. Appalachian Electric Power Company*, 107 Fed. (2d) 769, 809; *United States v. Rio Grande Irrigation Company*, 174 U. S. 690; *California Oregon Power Company v. Cement Company*, 295 U. S. 142; *United States v. Utah*, 283 U. S. 64; *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *Appalachian Electric Power Company v. Smith*, 4 F. Supp. 6 (W. D. Va.).

For years Congress has been legislating on the subject of flood control. Flood control is one of the important methods whereby the navigability of a river is benefited and whereby the government may properly function in its regulation of interstate commerce. This principle is definitely recognized in *United States v. Appalachian Electric Power Company*, supra. We think unquestionably that Congress has said this dam is being constructed for the benefit of navigation and for flood control. In so far as the dam is constructed for either or both of these purposes, the defendants are proceeding under a valid Act of Congress. Congress in thus proceeding does so under its power of regulating and controlling interstate commerce. The power to promote interstate commerce is a general power and Congress may do everything that reasonably relates to that express power. It may deepen the channels of navigable streams, it may undertake flood control projects on such streams, it may build and construct highway bridges across navigable and [fol. 37] non-navigable streams. Its power to prevent floods interfering with interstate commerce is not limited to navigable streams, and it may do anything that is reasonably necessary to prevent the interruption of interstate commerce upon navigable rivers. Flood control improves navigation and is an effective means of controlling, improving and thereby regulating interstate commerce. Having concluded that this legislation is valid under the power of Congress to regulate and control interstate commerce, it is not necessary for this court to pass upon whether or not it might be valid under any other clause of the constitution.

The plaintiff makes much of its argument that the generation of electric power is in no way incidental to flood control. While it may be true that the generation of electricity is not incidental to flood control, it manifestly is true that when the government impounds water behind a dam for purposes

of flood control, there is a vast amount of stored energy which may reasonably be converted into electrical energy. In this potential electrical energy in water impounded behind a dam built for some constitutional purpose by the United States government, the government has a proprietary interest. In the Appalachian case, *supra*, the Court said: "Water power development from dams in navigable streams is, from the public standpoint, a by-product of the general use of the rivers for commerce."

If the Denison Dam were being constructed upon the navigable portion of Red River, if, if the Red River at the point where the dam is being constructed were navigable in fact, it might be assumed that the plaintiff would not question the right of the government to include within the project the hydroelectric feature. It is well settled that the government may build a power project in connection with regulating the navigability of streams. In the *Ashwander* case, *supra*, the Court said: "The government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam, and that water power came into the exclusive control of the federal government. The mechanical energy was converted into electrical energy and the water power, the right to convert it into electrical energy, and the electricity thus produced constitute property belonging to the United States."

[fol. 38] But the Red River at the point where the dam is being constructed has been determined by the Supreme Court of the United States to be non-navigable. Does this fact preclude the government from utilizing the stored energy in the water impounded for the generation of electric power? We think not. The waters to be impounded are flood waters that would pass on without utilization by the State except for the erection of the dam with funds expended by the government. Having created this energy by the expenditure of its funds, the government has a right to utilize it in liquidating the expense of maintaining the structure and in paying the cost of its construction. Since Congress is not limited to the navigable portion of a stream in building a dam for proper purposes, the inclusion of an electric or power project in connection therewith is not prohibited. No case holds that the power part of the project must be in aid of the other purposes or that the manufacture of electricity must be a mere incident to the other purposes.

A proper understanding of the cases leads to the conclusion that as an incident to the construction of a dam for proper purposes the government has the power to connect therewith a project, for making use of the mechanical energy in the stored waters and convert it into electrical energy as a means of liquidating the cost and expense of maintaining the project.

Fundamentally, what plaintiff seeks to have this court declare and determine, is that Congress enacted this legislation for one purpose but declared it to be for another purpose. This would in effect accuse Congress of using a declared purpose as a subterfuge for accomplishing an act not within its power. This court will not assume that Congress determined to invade the sovereign rights of the State of Oklahoma and use its waters for an illegal purpose under the guise of a legal or proper purpose. This court may not inquire into the motives which induced members of Congress to enact the Denison Dam legislation, *Arizona v. California*, *supra*. Congress in passing this legislation had before it House Document 541, and, after consideration of House Document 541 and other evidence before it, reached the conclusion that the Denison Dam would serve the purpose of navigation and flood control. In reaching this conclusion, we cannot say that Congress acted arbitrarily. Since Congress was functioning in the field of its granted constitutional power, there is and can be no invasion of state sovereignty. *United States v. Appalachian Electric Power* [fol. 39] *Company, supra*.

The motion of the defendants to dismiss is sustained. The Attorneys for the defendants will prepare a decree in proper form. This matter is set for entry of such decree at Muskogee on the 8th day of February, 1941, at 10:00 A. M.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES DISTRICT COURT

MINUTES AND RECORD OF PROCEEDINGS AND ORDERS OF THE
COURT OF FEBRUARY 8, 1941

Filing & entering Judgment on dismissal of Hon. Walter A. Huxman, Alfred P. Murrah, U. S. Circuit Judges and Hon. Eugene Rice, U. S. Dist. Judge, sustaining motion of Defts., to dismiss and dismissing said cause and that defts.

recover their costs, to which action of the Court the Plf., excepts for the reasons and on the grounds set forth in the assignment of error which we have and present to the Court and which will presently be filed with the Clerk of this Court.

Filing & entering Order allowing Appeal.

[fol. 41] IN UNITED STATES DISTRICT COURT

JUDGMENT ON DISMISSAL—Filed February 8, 1941

Now on this 28th day of October, 1940, there came on for hearing in open court the motion of the defendants to dismiss this cause of action; the plaintiff appeared by Mac Q. Williamson, Attorney General of the State of Oklahoma, Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma, C. C. Hatchett and William O. Coe; the defendants appeared by Norman M. Littrell, Assistant Attorney General of the United States, and Charles O. Butler, Attorney of the Department of Justice of the United States, and that no other appearances were made. After hearing the arguments of counsel for both plaintiff and defendants, the court directed briefs to be filed in support of and in opposition to said motion to dismiss and took said case under advisement.

Now on this 25th day of January, 1941, the court having had said case under advisement and having considered said motion to dismiss, the briefs of both plaintiff and defendants, and the law of the case, finds said motion to dismiss should in all things be sustained and therefore no injunctive relief should be granted and on this date files herein its memorandum opinion and directs that a decree be entered in accordance therewith on February 8, 1941.

Now on this 8th day of February, 1941, counsel for all parties appeared, and counsel for plaintiff having therupon in open court elected to stand on the complaint and record,

It Is Therefore Ordered, Adjudged and Decreed that the motion of the defendants to dismiss should be and the same is hereby sustained, and that this action be and the same is [fol. 42] hereby dismissed, and the injunction prayed for by the plaintiff be and the same is hereby denied, and that the

defendants go hence without day and that they have and recover their costs herein expended.

Dated this 8th day of February, 1941.

Walter A. Huxman, Alfred P. Murrah, Eugene Rice,
Judge.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed February 8, 1941

Comes now the State of Oklahoma upon the relation of Leon C. Phillips, Governor of the State of Oklahoma, plaintiff in the above entitled cause, petitioner herein, and for its petition for appeal, respectfully shows:

I

That on February 8, 1941, an order and judgment was made and entered herein in favor of the defendants, Guy F. Atkinson Company, a corporation, Cleon A. Summers and Curtis P. Harris, dismissing the plaintiff's complaint herein and denying the injunction as prayed for by plaintiff in its said complaint.

II

That said Court, in making and entering said order and judgment committed manifest error to the prejudice of the plaintiff, and plaintiff feeling aggrieved by the making and entering of said order and judgment does hereby appeal therefrom to the United States Supreme Court for the reasons specified in the Assignment of Errors filed herewith and made a part hereof.

III

That there is filed herewith and made a part hereof, a statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the rules of that Court.

Wherefore, said plaintiff, petitioner herein, prays for the allowance of an appeal from said order and judgment of this Court to the Supreme Court of the United States for the correction of said errors; that the amount of the cost

bond be fixed, conditioned as required by law, and reasonable time be given plaintiff within which to make and file the same; that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon [fol. 44] which said order and judgment was made, duly authenticated, may be sent to the United States Supreme Court.

The State of Oklahoma, Plaintiff, by Mac Q. Williamson, Attorney General of the State of Okla.; Randall S. Cobb, First Assistant Attorney General of the State of Oklahoma; C. C. Hatchell, of Durant, Wm. O. Coe, of Oklahoma City, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed February 8, 1941

Now comes the plaintiff, State of Oklahoma, upon the relation of Leon C. Phillips, Governor of the State of Oklahoma, and hereby makes and files the following assignments of error upon which the plaintiff will rely in the prosecution of its appeal from the order, judgment and decree entered herein on February 8, 1941, dismissing the complaint and denying the injunction, to-wit:

The Court committed manifest error in dismissing plaintiff's complaint and denying the injunction prayed for, for the following reasons:

1. The Court committed error in finding and holding that the Act of Congress approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3rd Session, Section 4, was passed by Congress with the full knowledge of the changes made in the plans for the construction of the Denison Reservoir project as described in House Document 541, and in further holding that said Act may be considered as a ratification of the modifications of said project.

2. The Court committed error in finding and holding that Section 4 of the Flood Control Act of June 28, 1938, 52 Stat. 1215, applies to all of the projects contained in said Act, including the Denison Reservoir project, even though Con-

gress, in making the specific reference to the Denison Reservoir, used the language: "For flood control and other purposes."

3. The Court committed error in finding and holding that the plaintiff in this case in effect asked the Court to determine that the purposes of the Denison Reservoir project are not those that Congress has said them to be, and in holding that the Act of Congress declaring this project to be in aid of navigation or commerce, is conclusive on the Court in this case; and in this connection, disregarding the allegations in the complaint and amendment thereto, as well as the findings of the engineers as contained in House Document 541, that the Denison project has no direct or substantial relation to the improvement of navigation.

[fol. 46] 4. The Court committed error in finding and holding that it was without power to give due regard to the true facts and to find and determine the true purpose of the Denison Reservoir project, notwithstanding the expressed or pretended purpose of said project as set forth by Congress in the Act approved June 28, 1938, being H. R. 10618, (Public No. 761, 75th Congress, 3rd Session, Chapter 795, 52 Stat. 1215), styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes,"

and the Act of Congress approved October 17, 1940, being H. R. 9972, Public 868, Chapter 895, 76th Congress, 3rd Session.

5. The Court committed error in finding and holding that it is not for the Courts to go behind the expressed purpose of an Act of Congress and say that it was not enacted for that purpose in view of the allegations of the complaint that this project has no substantial relation to or benefit of any public purpose.

6. The Court committed error in finding and holding that the means provided in the Act of Congress authorizing the Denison Reservoir, or dam, are not unrelated to the expressed objects of the legislation.

7. The Court committed error in finding and holding that as applied to the facts alleged in the complaint that the power of the United States government over the waters of

Red River and the Washita is not limited to the control for the purposes of navigation or flood control.

8. The Court committed error in finding and holding that under the allegations of the complaint the United States is not limited in its activity to the control of only the navigable portions of Red River.

9. The Court committed error in finding and holding that the government may construct a dam and power project on a non-navigable portion of a stream for the purposes of controlling floods in the navigable portions of the stream below the dam.

10. The Court committed error in finding and holding that the Denison Reservoir project is, notwithstanding the allegations of the complaint, for the purpose of improving and benefitting navigation and interstate commerce.

[fol. 47] 11. The Court committed error in finding and holding that the Denison Reservoir project reasonably relates to the promotion of interstate commerce.

12. The Court committed error in finding and holding that the legislation for the Denison Reservoir project is valid under the power of Congress to regulate and control interstate commerce.

13. The Court committed error in finding and holding that when the government impounds waters behind the proposed dam for purposes of flood control that it may convert the stored energy thereby created into electrical energy, and that in this potential electrical energy the United States has a proprietary interest.

14. The Court committed error in finding and holding that, contrary to the allegations of the complaint, the power of falling water, in so far as it relates to the Denison Reservoir project, is an inevitable incident of the construction of the dam, and that waterpower thereby created comes into the exclusive control of the Federal Government, and that the electricity thus produced constitutes property belonging to the United States.

15. The Court erred in finding and holding that the government is not precluded from utilizing the stored energy in the water to be impounded by the Denison Reservoir project for the generation of electric power, notwithstanding

ing Red river at the point where the dam is to be constructed has been declared to be non-navigable.

16. The Court committed error in assuming, finding and holding contrary to the allegations of the complaint, that the hydroelectric feature of this project has any relation to the waters which may be impounded for flood control.

17. The Court committed error in assuming, finding and holding that just as much of plaintiff's domain, lands, roads and bridges would be required for a flood control project as one for the dual purpose of flood control and the generation of hydroelectric power.

18. The Court committed error in finding and holding that the power part of the Denison Reservoir project need not be in aid, or a mere incident to, a constitutional purpose.

[fol. 48] 19. The Court committed error in finding and holding that the United States, as an incident to the construction of a dam for proper purposes such as navigation or flood control, has the power to construct therewith an additional structure for making use of the mechanical energy in the stored waters as a means of liquidating the cost and expense of maintaining the property.

20. The Court committed error in finding and holding contrary to the allegations of the complaint, that the plaintiff's contention is to have the Court declare and determine that Congress enacted this legislation for one purpose but declared it to be for another purpose.

21. The Court committed error in disregarding the allegations of the complaint to the effect that the two purposes of this project are unrelated to each other except by the fortuitous circumstance of being authorized in a single act.

22. The Court committed error in disregarding the allegations of plaintiff's complaint that the two purposes of the Act for the Denison Reservoir project are physically separates and neither are related to the other except by the circumstance of being located at the same site and authorized by the same Act.

23. The Court committed error in finding and holding, contrary to the allegations of fact contained in plaintiff's complaint, that Congress did not determine the invasion of

the sovereign rights of the plaintiff to use its waters for an illegal purpose under the guise of a legal or proper purpose.

24. The Court committed error in finding and holding, in disregard of the allegations of the complaint, that Congress was functioning in the field of its granted constitutional power in the Act authorizing the Denison Reservoir project, and that therefore there is and can be no invasion of State sovereignty.

25. The Court committed error in assuming, finding and holding that the United States government owns, or has power or jurisdiction over, the waters of Red river at the site of the proposed Denison Reservoir.

26. The Court committed error in assuming, finding and holding that the United States government owns, or has power or jurisdiction over, the waters of the Washita river at the site of the proposed Denison Reservoir.

[fol. 49] 27. The Court committed error in assuming, finding and holding, contrary to and in disregard of the allegations of fact set forth in the complaint, that the waters of Red river, and the waters of Washita river, would not be utilized by the State of Oklahoma.

28. The Court committed error in finding and holding that the Acts of Congress of June 28, 1938, 52 Stat. 1215, and Section 4 of the Act of Congress approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3rd Session, are constitutional in so far as the same relate to the Denison Reservoir project, and are within the express and implied powers of Congress.

29. The Court committed error in assuming, finding and holding that the construction of the Denison Reservoir project by the United States through the acts of the defendants, and the taking of the waters of Red river and the Washita river for that purpose, and the destruction of the States properties, boundaries, roads, highways and bridges, school districts and subdivisions of government, and the destruction of the tax resources of the State of Oklahoma, is not an invasion of the sovereign, quasi sovereign and proprietary rights of the State of Oklahoma, vital to it and reserved and secured to the State of Oklahoma by the Tenth Amendment to the Constitution of the United States.

30. The Court committed error in disregarding the plain, unambiguous and uncontradicted facts alleged in the Bill

of Complaint, and in holding that the Court did not have power and jurisdiction to regard the true facts and base its decision thereon, without regard to the pretended facts as declared by the Acts of Congress of June 28, 1938, 52 Stat. 1215, and of October 17, 1940, H. R. 9972, Public 868, Chapter 895, 76th Congress, 3rd Session, Section 4.

31. The Court committed error in dismissing the Bill of Complaint.

32. The Court committed error in entering its judgment and decree denying the injunction on the record and the complaint.

33. The Court committed error in finding and holding that the use of the waters of the Washita river and the waters of the Red river as they pass through Oklahoma do not constitute the property of the State of Oklahoma, and that the State of Oklahoma does not have the right to appropriate and use the same for such purposes as it deems best, and further committed error in finding and holding that said waters may be diverted by the United States to a point outside of the State of Oklahoma and there used and appropriated for purposes of no benefit to the State of Oklahoma, [fols. 50-60] and against the consent of the State of Oklahoma.

34. The Court committed error in finding and holding that the tax resources of the State of Oklahoma and the waters of the State of Oklahoma, and the highways and bridges of the State of Oklahoma, may be taken for the construction of the Denison Reservoir project without compensation to the State of Oklahoma.

Wherefore, Plaintiff prays that the order, judgment and decree of the Court dismissing the complaint and denying the injunction may be reversed, and the cause remanded to the District Court for further proceedings consistent with the law and as justice may require.

Dated this 8th day of February, 1941.

The State of Oklahoma, Plaintiff, By Mac Q. Williamson, Attorney General of the State of Oklahoma. Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma. C. C. Hatchett, of Durant, Wm. O. Coe of Oklahoma City, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 61-63] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed February 8, 1941

The petition of the plaintiff, State of Oklahoma, upon the relation of Leon C. Phillips, Governor of the State of Oklahoma, in the above entitled cause for an appeal to the Supreme Court of the United States from the order, judgment and decree dismissing the complaint and denying the injunction prayed for entered in the above cause on the 8 day of February, 1941, is hereby granted and the appeal is allowed upon said petitioner giving bond according to law in the sum of Five Hundred Dollars, with sufficient sureties conditioned as required by law to pay all costs that may be assessed against said petitioner.

It Is Further Ordered that a transcript of the record, proceedings and papers upon which the order, judgment and decree dismissing the complaint and denying the injunction was made, duly authenticated, be transmitted to the Supreme Court of the United States.

Dated this 8th day of February, 1941.

Eugene Rice, United States District Judge for the Eastern District of Okla. Walter A. Huxman, United States Circuit Judge for the Tenth Circuit. Alfred P. Murrah, United States Circuit Judge for the Tenth Circuit.

[File endorsement omitted.]

[fols. 64-70] Citation in usual form showing service on Norman M. Littell et al. omitted in printing.

[fol. 71] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 72-73] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD ON APPEAL—Filed March 20, 1941

1. Comes now the appellant in the above entitled cause and for its statement of the points on which it intends to rely in its appeal to this Court adopts the points contained in its assignments of error heretofore filed herein.

2. Appellant herein designates process served on the defendants and return of the Marshal on the service thereon,

the affidavit of service on the Attorney General of the United States, appeal bond and praecipe for record as being unnecessary for the consideration of the points herein relied upon. Appellant designates all other portions of the record as being necessary for such consideration.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma, Capitol Building, of Oklahoma City, Oklahoma; C. C. Hatchett, Durant, Oklahoma; Wm. O. Coe, Braniff Building, Oklahoma City, Oklahoma, Counsel for Appellant.

[fol. 74] Affidavit of Service of Statement of Points on Which Appellant Intends to Rely, With Designation of Parts of Record Which it Thinks Necessary for the Consideration Thereof

C. C. Hatchett, on his oath, states that he is one of counsel for appellant; that on the 19 day of March, 1941, he mailed a true and correct copy of appellant's statement of points and designation of portions of record on appeal, with the postage thereon prepaid, addressed to the attorneys of record for the appellees, namely, Norman M. Littell, Assistant Attorney General of the United States, Washington, D. C., Charles O. Butler, Attorney Department of Justice, Washington, D. C., Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, and Curtis P. Harris, Special Attorney Department of Justice, Key Building, Oklahoma City, Oklahoma.

C. C. Hatchett.

Subscribed and sworn to before me this March 19, 1941. Mary L. Partaine, Notary Public. My commission expires January 29, 1942. (Seal.)

[fol. 75] [File endorsement omitted.]

Endorsed on Cover: File No. 45,181. Eastern Oklahoma, D. C. U. S. Term No. 832. State of Oklahoma ex rel. Leon C. Phillips, Governor of the State of Oklahoma, Appellant, vs. Guy F. Atkinson Company, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, et al. Filed March 11, 1941. Term No. 832 O. T. 1940.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

THE CLERK
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No. 832

STATE OF OKLAHOMA, ex Rel. LEON C. PHILLIPS,
GOVERNOR OF THE STATE OF OKLAHOMA,
Appellant,

v.s.

GUY F. ATKINSON COMPANY, CLEON A. SUMMERS,
UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF
OKLAHOMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

MAO Q. WILLIAMSON,
Attorney General of Oklahoma;

RANDALL S. CORB,
First Assistant Attorney General;

C. C. HATCHETT,

Wm. O. Con,

Counsel for Appellant.

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INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Preliminary statement	1
Jurisdictional statement	10
Statutory provisions sustaining jurisdiction	10
Statute the validity of which is assailed	11
Nature of the case	12
Date of the decree and application for appeal	12
Cases believed to sustain the jurisdiction	12
Exhibit "A"—Opinion of the District Court of the United States for the Eastern District of Oklahoma	14

TABLE OF CASES CITED.

<i>California Water Service Co. v. Redding</i> , 304 U. S. 252, 82 L. Ed. 1323	13
<i>International Ladies Garment Workers' Union v. Donnelly Garment Co.</i> , 304 U. S. 243, 82 L. Ed. 1316	12
<i>Oklahoma v. Texas</i> , 260 U. S. 633	3
<i>State Board of Equalization v. Young's Market Co.</i> , 299 U. S. 59, 81 L. Ed. 38	13
<i>William Jameson & Company, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury</i> , 307 U. S. 171, 83 L. Ed. 1189	12

STATUTES CITED.

Act of Congress of August 24, 1937, Chapter 754, Section 3, 50 Stat. 752 (28 U. S. C. A. 380a)	9, 10
Act of Congress of June 28, 1938 (H. R. 10618), (Public No. 761, 75th Congress, Chapter 795, 3rd Session), 52 Stat. 1215	2, 6, 10
Constitution of the United States, Article I, Section 8	11

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 832

STATE OF OKLAHOMA, *ex Rel.* LEON C. PHILLIPS,
GOVERNOR OF THE STATE OF OKLAHOMA,

Appellant,
vs.

GUY F. ATKINSON COMPANY, A CORPORATION UNDER
THE LAWS OF THE STATE OF NEVADA, CLEON A. SUM-
MERS, UNITED STATES DISTRICT ATTORNEY FOR THE
EASTERN DISTRICT OF OKLAHOMA, AND CURTIS P. HAR-
RIS, SPECIAL ATTORNEY, DEPARTMENT OF JUSTICE OF THE
UNITED STATES,

Appellees.

STATEMENT OF BASIS ON WHICH APPELLANT
CONTENDS THE SUPREME COURT OF THE
UNITED STATES HAS JURISDICTION TO REVIEW
ON APPEAL THE ORDER, JUDGMENT AND DE-
CREE DISMISSING THE COMPLAINT AND DENY-
ING THE INJUNCTION, AS REQUIRED BY RULE
12 OF THE SUPREME COURT OF THE UNITED
STATES.

Preliminary Statement.

It is deemed advisable to make a preliminary or introductory statement of fact preceding the principal jurisdictional statement hereof, so that the Court may better understand the nature of the case.

This is a case or controversy of a civil nature between the appellant, The State of Oklahoma, and the appellees, Guy F. Atkinson Company, a corporation, the building contractor commencing construction of the project in question, and Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney, Department of Justice of the United States, who are instituting proceedings to condemn lands for the purposes of said project. The controversy arises out of and directly involves the validity of an Act of Congress of the United States, passed and approved on June 28, 1938, being H. R. 10618 (Public No. 761, 75th Congress, Chapter 795, 3rd Session), 52 Stat. 1215, Styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes"

more specifically that portion of said Act of Congress entitled,

"The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000.00: PROVIDED, That in the consideration of benefits in connection with the Denison Reservoir all benefits that can be assigned to the proposed Altus Project and other such projects in Oklahoma shall be reserved for said projects."

The complaint and the record shows that:

- o The Denison Reservoir on Red River in Texas and Oklahoma, authorized by said Act, is being constructed by appellees at a point about four miles northwest of Denison,

Texas, and approximately sixteen miles southwest of Durant, Oklahoma, by the erection of a huge earthen dam some four or five miles in length across Red River. The greater portion of said dam will be and rest upon Oklahoma soil, and will form a huge reservoir which will inundate approximately 100,000 acres of Oklahoma land. Said dam will impound the waters of Red River in Oklahoma, and of the Washita River, a tributary of said Red River, which lies wholly within the State of Oklahoma. Red River flows in a south easterly direction. The cut bank along the southerly side of the sand bed constitutes the south bank of Red River, and the southern boundary of Oklahoma is on and along the south bank of Red River at the mean level of the water when it washes the bank without overflowing it (260 U. S. 633). No part of Red River within the State of Oklahoma is a navigable water of the United States (*State of Oklahoma, complainant, State of Texas, defendant, United States, intervener*, 258 U. S. 574, No. 20 Original, decided May 1, 1922). Red River has remained non-navigable and is not now a navigable water of the United States. Likewise, Red River as it passes through the State of Oklahoma is entirely an Oklahoma Stream (260 U. S. 606, No. 18 Original, decided January 15, 1923).

Approximately 3800 acres of the land which is to be inundated by the waters of said reservoir and is about to be condemned by the appellees, Cleon A. Summers and Curtis P. Harris, is owned by the State of Oklahoma as fast lands in its capacity as a sovereign State. Said reservoir will destroy many miles of highways and right-of-way therefor, and many bridges, all devoted to the public use and all owned by appellant as a sovereign State. Said highways and bridges about to be destroyed are strategically located and form vital and connecting links in the intricate system of state highways owned by appellant. Much of the

4

counties of Love, Marshall, Johnson and Bryan of the State of Oklahoma will be taken and many school districts completely destroyed or crippled. The approximately 100,000 acres of land located within the State of Oklahoma which will be inundated by the reservoir are principally agricultural lands now inhabited by approximately two thousand families or a total of approximately eight thousand people, citizens and residents of appellant. Much of said land is rich soil in a high state of cultivation and is used by the inhabitants thereof as homes and as a means of livelihood.

Much of said land to be inundated has large potential oil reserves and on some land there is now located many oil wells, and extensive drilling activities are going on in the area at this time. It is now practically certain that approximately 15,000 acres of said lands to be inundated by the reservoir will be, when developed, highly productive of oil and gas. Appellant derives much of its revenue used for the support of its government, including its university, colleges and eleemosynary institutions from a tax levied upon the gross production of oil and gas. The taking of said lands will cause appellant great loss in its taxable revenues and will seriously hamper appellant in the execution of its governmental functions as one of the States of the American Union.

The annual wealth production from agricultural products alone accruing to the citizens of appellant State from the lands which will be inundated is the sum of approximately \$1,500,000.00.

Approximately fifty miles of the southern boundary of appellant State is to be inundated, obliterated, and for all practical purposes destroyed.

As provided in said House Document 541, the waters of Red River and the Washita River are to be impounded by and above said dam creating said huge reservoir, and then

diverted out of the dominion of the State of Oklahoma and into the State of Texas and there run through conduits and turbines located entirely within the State of Texas for the generation of hydroelectric power for the principal benefit of the area located around Dallas and Fort Worth, Texas. The said waters of Red River and the Washita River to be impounded and diverted as aforesaid, belong to appellant. The taking thereof and the building of the said reservoir project is without the consent of appellant, State of Oklahoma, and against its objections and protests and without compensation to it.

The declared purposes of Congress in the building of said reservoir as shown by the Act itself, and by an examination of said House Document 541, 75th Congress, 3rd Session, same being an engineers report, is for flood control and the development of hydroelectric power and the two purposes are combined together in the one statutory enactment. Appellant alleged in the complaint in numerical Paragraph 6 thereof, that subsequent to the passage and approval of the Act of Congress aforesaid (H. R. 10618, 75th Congress, 3rd Session), the statutory scheme has been changed by the Secretary of War and Chief of Engineers from a plan preponderantly for flood control to a plan preponderantly for the development of water power.

The appellee, Guy F. Atkinson Company, a corporation, purporting to act under contract with the Secretary of War, or the Board of Army Engineers, or the Chief of Army Engineers, has now located on the Oklahoma side of the proposed dam a great number of machines consisting of trucks, tractors, steam shovels, rig lines and other equipment for the removal of earth, rock and gravel and is now engaged in the construction of the dam across Red River at the proposed location aforesaid. The said appellee, Guy F. Atkinson Company relies solely and exclusively

for the validity of its said contract its acts in the construction of said project as aforesaid, on the Act of Congress hereinabove mentioned and set forth, to-wit, H. R. 10618, 75th Congress, 3rd Session, 52 Stat. 1215.

The appellee, Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and the appellee, Curtis P. Harris, Assistant to the Department of Justice of the United States of America, relying exclusively upon said act of Congress, have instituted numerous condemnation suits in the courts for the purpose of acquiring the title to various tracts of land within the proposed reservoir, and for the purpose of the proposed reservoir, and said appellees now propose and intend to institute additional condemnation suits for the purpose of acquiring additional lands therefor, all of which lands are located within the domain of appellant State.

At no time has appellant given its consent to the acts and proposed acts of said appellees, or any of them, but on the contrary, has at all times protested and made numerous protests in writing to the Secretary of War, having charge of the construction of said dam and reservoir, of which protests and objections said appellees have had and do now have actual notice.

The taking said lands off the *ad valorem* tax rolls, will alone cause a net taxable loss to subdivisions of government of the State of Oklahoma in the sum of approximately \$40,000.00 per year.

Appellant alleges in the complaint that the Act of Congress aforesaid, authorizing construction of said Denison Reservoir is not for a public purpose and is unconstitutional and void and beyond the power of the United States, and that the construction of said reservoir is in violation of the rights of appellant reserved to it by the Tenth Amendment to the Constitution of the United States, and that

the acts and threatened acts of the appellees as aforesaid constitute a direct invasion and destruction of its sovereign, quasi sovereign, territorial boundary and proprietary rights in that,

(1) Appellant will be compelled to surrender its jurisdiction of and over the territory inundated, and,

(2) Appellant will be deprived of its established boundary line for a distance of approximately fifty miles, and,

(3) Appellant will be deprived of many thousand acres of its best lands, which will be in effect, a forceable reduction of the area of appellant as one of the States of the American Union, and,

(4) Appellant will be deprived of its ownership in fee simple of approximately 3800 acres of land which it owns and holds for the benefit of its schools and institutions, and,

(5) Appellant's highways and rights-of-ways therefor, and bridges will be destroyed and its integrated system of communication and travel over said highways and bridges will be interrupted and destroyed, and,

(6) The waters of the Washita River and Red River owned by appellant will be taken from it in violation of its laws without payment, or offer of any payment or compensation for the taking thereof, and said waters will be diverted into another State without benefit to appellant, and there used and appropriated for the purpose of generating hydroelectric power to be sold on the available market without compensation to appellant, notwithstanding said waters belong to appellant, and,

(7) Said project will oust appellant's citizens from approximately 100,000 acres of agricultural lands and will

thereby create a serious social and economic problem to appellant, the burden of which will fall heavily upon the appellant, and there is no compensation, nor measure of compensation offered or afforded appellant, and,

(8) Said project will destroy more than thirty of appellants subdivisions of government, or so cripple the same by loss of taxable revenues as to make it impossible for such subdivision to function.

Appellant instituted this action by complaint filed in the United States District Court for the Eastern District of Oklahoma within which judicial district the said dam and reservoir are located. Appellant contended by said complaint and now contends that the appellees are without lawful power or authority to institute the proceedings for the condemnation of said lands or to construct said project; that the Act of Congress, as same is being applied, and as the same is sought to be applied and enforced by the appellees and under which they are acting in the premises aforesaid, and upon which they exclusively and solely rely is beyond the power of Congress to enact, and is repugnant to the Constitution of the United States, and is void, and that the same contravenes the rights and powers of appellant, reserved to it by the Tenth Amendment to the Constitution of the United States; that said project and scheme as outlined and set forth in said Act and in House Document 541, as aforesaid, are not for public purposes and are not within the power of Congress, expressed or implied, conferred by the Constitution of the United States by Section 8, Article 1, on any other provision thereof; that said acts and threatened acts of said appellees constitute an unlawful invasion and destruction of the sovereign, quasi sovereign, territorial, and proprietary rights of appellant, reserved

to it and protected by the Tenth Amendment of the Constitution of the United States, and inherent in our dual system of government. That said appellees are acting and threatening to act in excess of legal or constitutional authority, and unless enjoined and restrained they will commit and perform said illegal and void acts and invasions, to the irreparable injury of appellant, for which it has no complete, adequate, nor speedy remedy at law.

After the complaint was duly filed in the United States District Court for the Eastern District of Oklahoma, a three judge court was duly constituted, as provided by Section 380(a), Title 28 U. S. C. A. (50 Stat. 752, act approved August 24, 1937, Chapter 754, Section 3). Thereafter, the appellees duly filed in said cause their motion to dismiss the complaint. Said motion to dismiss was duly set for hearing and heard by said specially constituted three judge court, and thereafter the said motion to dismiss was by said court sustained with exception to appellant. The memorandum opinion of said court sustaining the contentions of appellees and sustaining the said motion to dismiss found and determined that said complaint failed to state a claim against appellees upon which relief could be granted, because the said Act of Congress, as the same being applied and sought to be applied by said appellees, was valid, legal and constitutional and was in nowise repugnant to the Constitution of the United States, and in nowise in violation of rights reserved to appellant by the Tenth Amendment to the Constitution of the United States.

Appellant thereupon elected to stand on the complaint and amendment thereto, and the record, and said Court thereupon made and entered its order, judgment and decree denying the injunction prayed for.

This appeal is taken from the order and judgment of said Court dismissing said complaint and denying the injunction prayed for.

Jurisdictional Statement.

Pursuant to Supreme Court Rule 12, appellant makes this statement particularly disclosing the basis on which it contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the order, judgment and decree appealed from, and says:

I.

The statutory provision believed to sustain jurisdiction of this appeal by the Supreme Court of the United States is, Section 3, Chapter 754, Act of Congress of August 24, 1937, Title 28, Section 380(a), U. S. Code (50 Stat. 752), and particularly the following provisions thereof:

"An appeal may be taken directly to the Supreme Court of the United States upon application therefor, or notice thereof, within thirty (30) days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case.

"Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

II.

The United States statute, the enforcement, operation and execution of which, by appellees, is sought to be enjoined by appellant, is:

"An Act of Congress of the United States passed and approved on June 28, 1938, being H. R. 10618, 75th Congress, 3rd Session, (Public No. 761, Chapter 795) 52 Stat. 1215, styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control and other purposes,"

and particularly that portion of said Act entitled:

"The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000: PROVIDED, That in the consideration of benefits in connection with the Denison Reservoir all benefits that can be assigned to the proposed Altus project and other such projects in Oklahoma shall be reserved for said projects."

The complaint alleges that said last named portion of said Act as same is being applied and is sought to be applied by the appellees is repugnant to the Constitution of the United States and is not within the powers of Congress, expressed or implied, conferred by the Constitution of the United States by Section 8, Article 1, or any other provision thereof, and that said act and threatened acts of said appellees under and pursuant to said Act of Congress constituted an unlawful invasion of the sovereign, quasi sovereign, territorial and proprietary rights of the appellant, State of Oklahoma, reserved to it and protected by the Tenth Amendment to the Constitution of the United States; that said appellees are acting and threatening to act in excess of legal or constitutional authority and unless enjoined and restrained, said appellees will commit and perform said illegal and void acts and invasions to the irreparable injury of appellant, State of Oklahoma, for which appellant has no complete, adequate, nor speedy remedy at law.

III.

On the 8 day of February, 1941, a specially constituted United States District Court for the Eastern District of Oklahoma, composed of three judges designated as provided by said Act of August 24, 1937, entered an order, judgment and decree dismissing the complaint and denying the prayer for injunction, and this appeal is taken from that order, judgment and decree. The specially constituted three judge court aforesaid, after notice to all parties, and after argument and hearing prepared and filed in said cause, on the 25 day of January, 1941, its Memorandum Opinion, wherein it held that the Act of Congress challenged by said complaint as being repugnant to the Constitution of the United States, as same was being applied and sought to be applied by appellees, was not repugnant to the Constitution of the United States and was valid and lawful, and that the acts and threatened acts of appellees were lawful.

There is appended to this statement a copy of said Memorandum Opinion delivered by said Court.

The Petition for Appeal was filed by this appellant with the Clerk of the United States District Court for the Eastern District of Oklahoma on the 8 day of February, 1941.

IV.

The cases which appellant believes sustains the jurisdiction of the Supreme Court of the United States to hear and determine this appeal, are:

William Jameson & Company, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury, 307 U. S. 171-174, 83 L. Ed. 1189;

International Ladies Garment Workers' Union v. Donnelly Garment Co., 304 U. S. 243-251, 82 L. Ed. 1316;

State Board of Equalization v. Young's Market Co.,

299 U. S. 59, 81 L. Ed. 38;

California Water Service Co. v. Redding, 304 U.S. ~~252~~,

82 L. Ed. 1323.

Dated this 8 day of February, 1941.

THE STATE OF OKLAHOMA,

By MAC Q. WILLIAMSON,

*Attorney General of the State
of Oklahoma;*

RANDELL S. COBB,

*First Assistant Attorney Gen-
eral of the State of Oklahoma;*

C. C. HATCHETT,

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Wm. O. COE,

*Of Oklahoma City;
Attorneys for Plaintiff.*

Filed February 8, 1941.

EXHIBIT "A".

(Caption Omitted).

Before HUXMAN and MURRAH, Circuit Judges, and RICE,
District Judge.

MEMORANDUM OPINION.

By this action the State of Oklahoma, upon the relation of Leon C. Phillips, Governor, challenges the right of the defendants to proceed with the construction of what is commonly known as the Denison Dam. The dam is now in the process of construction across Red River near Denison, Texas, and from a point in Bryan County, Oklahoma. The defendant, Guy F. Atkinson Company, a corporation, is the contractor and it is charged in the bill of complaint that he is purporting to act under a contract with the Secretary of War. The defendant, Cleon A. Summers, is the United States District Attorney for the Eastern District of Oklahoma. Curtis P. Harris, defendant, is a Special Attorney for the Department of Justice of the United States. As to the latter two defendants, it is charged that they have already instituted numerous suits for the condemnation of lands within the proposed area of the dam, and, unless enjoined, will institute other suits for the condemnation of lands within the State of Oklahoma. The plaintiff further alleges that the defendants are proceeding under a certain act of Congress passed and approved on June 28, 1938, being H. R. 10618, public No. 761, 75th Congress, chapter 795, 52 Stat. 1215, styled "An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes", and that this Act of Congress is unconstitutional and void, contravening powers reserved to the plaintiff by the Tenth Amendment; that it is wholly beyond the power of Congress to enact; that the project and scheme as outlined in the Act authorizing its construction and in House Document No. 541 referred to in the Act are not for a public purpose and are not within either the expressed or implied powers of Congress.

Other allegations contained in the plaintiff's bill are that if the dam is constructed as contemplated, it will inundate

approximately one hundred thousand acres of lands within the State of Oklahoma, much of which land is owned by the State of Oklahoma in fee simple; that it will destroy many of the highways of the State of Oklahoma; that it will compel eight thousand residents of the State of Oklahoma to move; that it will seriously affect political subdivisions of the State of Oklahoma, both counties and school districts in that much of the lands situated in such subdivisions will be taken; that much of the lands within the area affected are oil producing lands and that the building of the dam will seriously effect the development of these oil lands and will deprive the State of Oklahoma of much revenue to be derived from the gross production tax on the oil and gas that might be produced; and that the impounding of the waters behind said dam would cover lands in both the State of Texas and the State of Oklahoma and would thereby obliterate the boundary line between the two States; that under the plan it is contemplated that waters from both the Red River and the Washita River, a non-navigable tributary of the Red River wholly within the State of Oklahoma, are to be impounded and thereafter conducted through conduits into the State of Texas and there conducted through turbines for the purpose of generating electrical power; that the plan for the construction of said dam as disclosed in House Document 541 contemplates the construction of a dam for both flood control purposes and for the purpose of the generation of hydroelectric power; that the two purposes are functionally separate and neither is incidental or a necessary result of the other; that the electric power feature is not in aid of nor related to flood-control; that Red River within the State of Oklahoma is a non-navigable stream; that the non-navigability of Red River within the State of Oklahoma was determined by the Supreme Court of the United States in the case of *State of Oklahoma, complainant, v. State of Texas, defendant, United States, Intervener*, 258 U. S. 574, decided May 1, 1922.

The prayer of the plaintiff's bill of complaint is that the contractor, Guy F. Atkinson Company, its agents, servants and employees be permanently restrained and enjoined from constructing the dam in question and that the de-

fendants, Cleon A. Summers and Curtis P. Harris be enjoined and restrained from instituting and conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by plaintiff or located within its domain for the purpose of obtaining a site or right-of-way for said dam or the reservoir to be created thereby.

The defendants, represented by the Department of Justice of the United States, have filed a motion to dismiss. This motion to dismiss presents, first, the jurisdiction of the court to entertain this suit, and, second, appropriately raises the constitutionality of the Act of Congress involved. The accepted procedure for presenting this constitutional question by motion to dismiss. *Arizona v. California*, 283 U. S. 423; *Steward Machine Company v. Davis*, 301 U. S. 548; *New Jersey v. Sargent*, 269 U. S. 328.

At the threshold we are met with the objection to jurisdiction. Defendants contend that the government is the real party in interest, and, its consent not having been given, it may not be sued, and that the Secretary of War is an indispensable party. The immunity of the government from suit, to which it has not consented, is a principle too well established to require citation of authority. Is this a suit against the government? On the face of the pleadings it is not. The plaintiff is proceeding against the individual defendants on the theory that the Act of Congress under which they are admittedly acting is unconstitutional. Although there may be some slightly apparent conflict in the decisions, we think it is fairly well established that if an agent of the government acts without authority or attempts to act under a void or unconstitutional Act of Congress, he ceases to act in an official capacity and a suit against him is not a suit against the government, in such case the theory or fiction, if we would call it such, being that the government can act only under constitutional authority. It follows that the exemption of the government from suit does not exempt or protect its officials from being sued when they are proceeding without authority or under an unconstitutional Act of Congress. Otherwise, there would be no constitutional limitations, since there would be no way of testing the consti-

tutionality of the challenged procedure. *Philadelphia Company v. Henry L. Stimson, Secretary of War*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82; *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381; *Ryan v. C. B. & Q. Railroad*, 59 Fed (2nd) 137; *Franklin Township v. Tugwell, Administrator of Resettlement Administration*, 85 Fed. (2d) 208; *United States v. Lee*, 106 U. S. 196.

If the Act of Congress is unconstitutional, then the Secretary of War is not a necessary party. *Colorado v. Toll*, 268 U. S. 228; *Missouri v. Holland*, 252 U. S. 416; *Ryan v. Amazon Petroleum Corporation*, 71 Fed. (2d) 1. In *Colorado v. Toll, supra*, the Court says: "The object of the bill is to restrain an individual from doing acts that is alleged he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining his superior officers of the United States". It would seem, therefore, that if the Act is unconstitutional, the authorities sustain the right of the State to maintain the action, the appropriateness of injunctive relief, that it is not a suit against the United States, that the Secretary of War is not a necessary party. And, since the Act of Congress in question is challenged by the plaintiff as unconstitutional, and the constitutionality of the said Act is asserted by the defendants, who are within the jurisdiction of this Court and have been served by proper process, this court has jurisdiction to entertain the suit and must of necessity determine or pass upon the constitutionality of the Act. The question and the manner in which it is presented, rather than the ultimate answer, determine jurisdiction.

The motion to dismiss admits all facts well pleaded. It does not admit conclusions of law or deductions of fact not warranted. Most of the allegations of Plaintiff's complaint are immaterial in so far as the constitutionality of the Act in question is involved. Upon oral argument the attorneys for the plaintiff conceded that if the Act of Congress in question is constitutional, the motion of the defendant to dismiss should be sustained. They further admitted that in the determination of the constitutionality of the Act,

assuming the truth of all well pleaded allegations, no evidence was necessary or proper. They further admitted upon oral argument and in their brief that if the Act is constitutional, the government may acquire any and all lands by condemnation proceedings, even the lands of the State of Oklahoma, needed in the construction of this project. The sole question therefore, before the court upon this motion to dismiss is whether or not the Act is constitutional.

The contention of the plaintiff is that the construction of this dam has no relation to navigation; that the Act of Congress originally provided for a dam for two purposes, to wit: flood control and hydroelectric purposes; and that the inclusion of the hydroelectric feature rendered the entire Act unconstitutional; that it would not be necessary for the court to pass upon whether or not the dam could be built for flood control purposes, since the inclusion of the hydroelectric feature would in all events render the Act unconstitutional for the reason that the government may not impound the waters of a non-navigable portion of a stream even for a lawful purpose and thereafter use the waters impounded for generating electric power.

The Act of Congress of June 28, 1938, under which the defendants are proceeding is entitled "An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes" 52 Stats. 1215. This is a comprehensive Act dealing with flood control projects in many parts of the United States. The declared purpose of the Act, as contained in Section 4, is "that the following works of improvements for the benefit of navigation and control of destructive floods, and other purposes, are hereby adopted and authorized * * *". In the original Act, after a statement of general purpose contained in Section 4, with specific reference to the Denison Dam, the following language is used: "The Denison Reservoir on Red River in Texas and Oklahoma, for flood control and other purposes, as described in House Document No. 541, 75th Congress, 3d Session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and

authorized at an estimated cost of \$54,000,000.00". By an Act approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3d Session, in Section 4 thereof Congress declared: "The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods, and for other beneficial uses". This last Act of Congress the plaintiff designated as no more than a self-serving declaration by Congress. This Act was passed by Congress with a full knowledge of the changes made in the plans as described in House Document 541, and may be considered as a ratification of the changes and modifications. It further reaffirmed the purpose of Congress in authorizing the construction of the dam. It might be observed that the declared purpose in the Act of October 17, 1940, is in no substantial particular different from that of Section 4 of the Act of June 28, 1938. It is merely a bit more specific. There is no substantial difference between "benefit of navigation" and the more specific statement "purpose of improving navigation, regulating the flow of Red River". In substance they mean the same. It seems further that the purposes as set forth in Section 4 of the Act of 1938 apply to all of the projects contained in the said Act, even though Congress in making the specific reference to the Denison Dam used the language "for flood control and other purposes". Certainly the Act of October 17, 1940, would remove any doubt that might exist by reason of the use of the particular language in the Act of 1938.

The plaintiff in this case in effect asks the court to determine that the purposes of the dam are not those that Congress has said them to be. Much time is given in the brief filed herein to a discussion of the evidence before the Congressional committee and to the report contained in House Document 541. The argument is made that in fact this dam will not be an aid to navigation or commerce. While House Document 541, in a summary of the benefits to navigation, contains the statement that present or prospective commerce on the navigable portion of Red River would not

justify the cost involved in the construction of the dam, it states "The construction of the Denison Reservoir would have a favorable effect on open channel navigation by reducing flood stages and increasing low water flows (page 68)". Again on page 72 it is said "In the event that at some future time prospective commerce should justify a navigation system, it is believed such a system would consist of reservoirs operated in conjunction with a series of locks and dams. If this contingency should materialize the proposed Denison Reservoir, located above the navigable portion of the river, would fit into such a general scheme of improvement". House Document 541 discusses flood control, benefits to interstate commerce, and the damaging effect of floods upon interstate commerce; and, after consideration of all the facts before it, Congress enacted the particular legislation for the purposes set forth in the Act itself. It is not for courts to go behind the expressed purpose of an Act of Congress and say that it was not enacted for that purpose as long as the means provided are not unrelated to the expressed objects of the legislation. *Arizona v. California*, 283 U. S. 423; *Ashwander v. T. V. A.*, 297 U. S. 288.

The power of the United States government over waters is not limited to control of navigation. In the recent case of *United States v. Appalachian Electric Power Company*, decided December 16, 1940, the court uses this language. "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. *Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.*" (Emphasis ours.) It is true that in the Appalachian case, supra, the court determined that the river was in fact navigable. It is well settled, however, that in the exercise of its control the government is not limited in its activity to that portion of a

stream which is in fact navigable if the stream in general is a navigable stream, as is the Red River in its lower parts. *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, 703. It is also well settled that the government may construct a dam and power project on the non-navigable portion of a stream for the purposes of controlling floods in the navigable portions of the stream below the dam. *United States v. Appalachian Electric Power Company*, 107 Fed. (2d) 769, 809; *United States v. Rio Grande Irrigation Company*, 174 U. S. 690; *California Oregon Power Company v. Cement Company*, 295 U. S. 142; *United States v. Utah*, 283 U. S. 64; *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *Appalachian Electric Power Company v. Smith*, 4 F. Supp. 6 (W. D. Va.).

For years Congress has been legislating on the subject of flood control. Flood control is one of the important methods whereby the navigability of a river is benefited and whereby the government may properly function in its regulation of interstate commerce. This principle is definitely recognized in *United States v. Appalachian Electric Power Company*, supra. We think unquestionably that Congress has said this dam is being constructed for the benefit of navigation and for flood control. In so far as the dam is constructed for either or both of these purposes, the defendants are proceeding under a valid Act of Congress. Congress in thus proceeding does so under its power of regulating and controlling interstate commerce. The power to promote interstate commerce is a general power and Congress may do everything that reasonably relates to that express power. It may deepen the channels of navigable streams, it may undertake flood control projects on such streams, it may build and construct highway bridges across navigable and non-navigable streams. Its power to prevent floods interfering with interstate commerce is not limited to navigable streams, and it may do anything that is reasonably necessary to prevent the interruption of interstate commerce upon navigable rivers. Flood control improves navigation and is an effective means of controlling, improving and thereby regulating interstate commerce. Having concluded that this legislation is valid under the power of

Congress to regulate and control interstate commerce, it is not necessary for this court to pass upon whether or not it might be valid under any other clause of the constitution.

The plaintiff makes much of its argument that the generation of electric power is in no way incidental to flood control. While it may be true that the generation of electricity is not incidental to flood control, it manifestly is true that when the government impounds water behind a dam for purposes of flood control, there is a vast amount of stored energy which may reasonably be converted into electrical energy. In this potential electrical energy in water impounded behind a dam built for some constitutional purpose by the United States government, the government has a proprietary interest. In the Appalachian case, supra, the court said: "Water power, development from dams in navigable streams is, from the public standpoint, a by-product of the general use of the rivers for commerce."

If the Denison Dam were being constructed upon the navigable portion of Red River, if, if the Red River at the point where the dam is being constructed were navigable in fact, it might be assumed that the plaintiff would not question the right of the government to include within the project the hydroelectric feature. It is well settled that the government may build a power project in connection with regulating the navigability of streams. In the Ashwander case, supra, the court said: "The government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam, and that water power came into the exclusive control of the federal government. The mechanical energy was converted into electrical energy and the water power, the right to convert it into electrical energy, and the electricity thus produced constitute property belonging to the United States."

But the Red River at the point where the dam is being constructed has been determined by the Supreme Court of the United States to be non-navigable. Does this fact preclude the government from utilizing the stored energy in the water impounded for the generation of electric power?

We think not. The waters to be impounded are flood waters that would pass ~~on~~ without utilization by the State except for the erection of the dam with funds expended by the government. Having created this energy by the expenditure of its funds, the government has a right to utilize it in liquidating the expense of maintaining the structure and in paying the cost of its construction. Since Congress is not limited to the navigable portion of a stream in building a dam for proper purposes, the inclusion of an electric or power project in connection therewith is not prohibited. No case holds that the power part of the project must be in aid of the other purposes or that the manufacture of electricity must be a mere incident to the other purposes. A proper understanding of the cases leads to the conclusion that as an incident to the construction of a dam for proper purposes the government has the power to connect therewith a project, for making use of the mechanical energy in the stored waters and convert it into electrical energy as a means of liquidating the cost and expense of maintaining the project.

Fundamentally, what plaintiff seeks to have this court declare and determine, is that Congress enacted this legislation for one purpose but declared it to be for another purpose. This would in effect accuse Congress of using a declared purpose as a subterfuge for accomplishing an act not within its power. This court will not assume that Congress determined to invade the sovereign rights of the State of Oklahoma and use its waters for an illegal purpose under the guise of a legal or proper purpose. This court may not inquire into the motives which induced members of Congress to enact the Denison Dam legislation, *Arizona v. California*, *supra*. Congress in passing this legislation had before it House Document 541, and, after consideration of House Document 541 and other evidence before it, reached the conclusion that the Denison Dam would serve the purpose of navigation and flood control. In reaching this conclusion, we cannot say that Congress acted arbitrarily. Since Congress was functioning in the field of its granted constitutional power, there is and can be no invasion of state sovereignty. *United States v. Appalachian Electric Power Company*, *supra*.

The motion of the defendants to dismiss is sustained.
The Attorneys for the defendants will prepare a decree in
proper form. This matter is set for entry of such decree
at Muskogee on the 8th day of February, 1941, at 10:00 A. M.

Filed Feb. 8, 1941, W. V. McClure, Clerk, U. S. District
Court.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM.
1940.

No. 832

STATE OF OKLAHOMA ex rel. LEON C. PHILLIPS,
Governor of the State of Oklahoma, *Appellant*,

vs.

GUY F. ATKINSON COMPANY, a Corporation Under
the Laws of the State of Nevada, CLEON A. SUM-
MERS, United States District Attorney for the
Eastern District of Oklahoma, and CURTIS P.
HARRIS, Special Attorney, Department of Justice
of the United States, *Appellees*.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT
COURT, FOR THE EASTERN DISTRICT OF OKLAHOMA.

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INDEX

OPINION BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
SPECIFICATION OF ERRORS	16

ARGUMENT

Point I.

Appellant has the standing to maintain a suit to enjoin the illegal and unconstitutional acts of appellees and thereby test the legality and constitutionality of the Acts of Congress under which they claim to act.	17
---	----

Point II.

Appellant as parens patria has a right to maintain this suit.	21
---	----

Point III.

The Denison Reservoir is a multiple purpose project on a non-navigable stream wholly within Appellant's domain, combining two functionally and physically separate and unrelated purposes.	23
--	----

Analysis of Statutory Scheme:

- A. Schemes and Recommendations of Engineers. 26
- B. The Statutory Scheme as Adopted by Congress Has no Real or Substantial Bona Fide Relationship to the Improvement of Navigation. 28
- C. Project Has no Appreciable Effect Upon the Control of the Flood Waters of the Mississippi. 30
- D. Allocation of Cost and Benefit of Statutory Scheme. 31
- E. Intention of Congress with Respect to Flood Control Feature of Project. 33

F. Two Purposes of Project Are Functionally and Physically Separate.	35
G. Project Will not Produce Firm Power But Only Power for Auxiliary or Peak Load Demand for Sale to an Existing Interconnected Power Company.	39
H. Benefits of Flood Control Feature of Project	41
I. Much Less of Appellant's Domain Would Be Required for a Flood Control Project Without Water Power	44

Point IV.

Congress is plainly without constitutional authority to authorize the forcible invasion and destruction of Appellant's quasi sovereign rights, the taking of its domain or own fast lands, roads and bridges for the construction of the water power feature of the Denison Reservoir Project. 46

A. Power Over Waters of Non-Navigable Streams	46
B. Power With Respect to Water Power Development	46

Point V.

The Denison Project cannot be sustained under the Interstate Commerce Power. 50

Point VI.

The Denison Project as the same is being applied by Appellees and in so far as authority is claimed for the taking and destruction of Appellant's quasi sovereign, proprietary and boundary rights, cannot be sustained under the General Welfare clause. 54

Point VII.

The Denison project as authorized by Congress, and as the same is being applied by Appellees, is in contravention of the Tenth Amendment of the Constitution of the United States and the restrictions implicit in our dual form of Government. 55

- A. Plaintiff Would Lose Jurisdiction Over, and Its Subdiyisions of Government Would Lose the Right to Tax the Land to Be Taken. ----- 55
- B. The Boundary of Appellant Would Be Obliterated for 40 Miles, Its Quasi Sovereign Rights Destroyed, Its Area Forcibly Reduced Contrary to the Holdings of this Court. ----- 55
- C. Appellant Has a Well Defined Statutory Program for the Conservation of its Waters and Water Resources With Which the Denison Project Directly Conflicts. ----- 56

Point VIII.

Since the statutory scheme purposefully inseverably and inextricably unites two functionally separate and independent projects, one being for the generation of water power, clearly beyond the power of Congress to enact, the whole Act falls. ----- 58

Point IX.

The declaration by Congress that this project is for the purpose of improving navigation, regulating the flow of Red River, controlling floods and other beneficial uses is not binding on the courts and does not preclude a judicial inquiry as to the facts. ----- 59

Point X.

The motion to dismiss which was sustained by the Trial Court admits all facts well pleaded. ----- 61

Point XI.

Power to condemn property exists only for public use, and a purpose outside of the Constitutional power of Congress is not a public use. ----- 61

CONCLUSION ----- 62

TABLE OF AUTHORITIES

Cases

<i>Arizona v. California</i> , (p. 37) 283 U. S. 423	49, 50
<i>Ashton v. Cameron Water Improvement District</i> , 298 U. S. 513, 581	55
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U. S. 288, 340	47, 50
<i>Berdie v. Kurtz</i> , 75 F.2d 898	18
<i>Bowen v. Johnston</i> , 306 U. S. 19, 23, 28	55
<i>Carter v. Carter Coal Company</i> , 298 U. S. 238, 295	54, 55
<i>Cherokee Nation v. Southern Kansas Ry. Co.</i> , 135 U. S. 641	60, 62
<i>City of New York v. Miln</i> , 11 Peters, 102, 138	55
<i>Colorado v. Toll</i> , 268 U. S. 228	18
<i>Connecticut Railway & Lighting Company v. Palmer</i> , 304 U. S. 493	60
<i>Cornell v. Coyne</i> , 192 U. S. 418, 428, 429	53
<i>Crowell v. Benson</i> , 285 U. S. 22, 55	60
<i>Franklin Township v. Tugwell</i> , 85 F.2d 208	17, 21
<i>Generich v. Rutter</i> , 265 U. S. 388	19
<i>Georgia v. Tennessee Copper Co.</i> , 206 U. S. 230	19, 21
<i>Ginsburg v. Popkin</i> , 285 U. S. 204, 208	60
<i>Greenwood County v. Duke Power Company</i> , 81 F.2d 986	54
<i>Hairston v. D. & W. Railroad Company</i> , 208 U. S. 599, 606	61
<i>Hopkins Federal Savings & Loan Association v. Cleary</i> , 296 U. S. 315	55
<i>Howard v. Illinois, et al., R. R. Company</i> , 207 U. S. 463, 501	58

<i>Hudson County Water Company v. McCarter, Attorney General</i> , 209 U. S. 349, 355, 356	22
<i>Ickes v. Fox</i> , 300 U. S. 82, 97	17
<i>In re Debs, Petitioner</i> , 158 U. S. 564, 583, 584	22
<i>Kansas v. Colorado</i> , 185 U. S. 125, 142	21
<i>Kansas v. Colorado</i> , 206 U. S. 46, 93	46
<i>Kansas Gas & Electric Co., v. City of Independence</i> , 79 F.2d 638	54
<i>Kaukauna Water Power Co., v. Green Bay and Mississippi Canal Company</i> , 142 U. S. 254, 273	46
<i>Keifer & Keifer v. Reconstruction Finance Corporation</i> , 306 U. S. 381, 388	17
<i>Kepner v. United States</i> , 195 U. S. 100	60
<i>Leovy v. United States</i> , 177 U. S. 621, 633	46
<i>Madisonville Traction Company v. St. Bernard Mining Company</i> , 196 U. S. 239, 251	61
<i>Minnesota v. Barber</i> , 136 U. S. 313, 319	60
<i>Missouri v. Holland</i> , 252 U. S. 416	18
<i>Mountain Timber Company v. Washington</i> , 243 U. S. 218, 237	60
<i>Mugler v. Kansas</i> , 123 U. S. 623, 661	60
<i>National Labor Relations Board v. Jones and Laughlin Corporation</i> , 301 U. S. 1, 30	53
<i>North Dakota v. Minnesota</i> , 263 U. S. 365, 375, 376	21
<i>Oklahoma v. Texas</i> , 258 U. S. 574	5, 50
<i>Oklahoma v. Texas</i> , 260 U. S. 606, 636	5
<i>Oklahoma ex rel. Johnson v. Cook</i> , 304 U. S. 387	22
<i>Philadelphia Company v. Stimson</i> , 223 U. S. 604, 619	17
<i>Polk Company v. Glover</i> , 305 U. S. 5, 9	61
<i>Rhode Island v. Massachusetts</i> , 12 Peters, 657, 733	55
<i>Ross v. Yearley</i> , 103 F.2d 589	18
<i>Ryan v. Amazon Petroleum Corporation</i> , 71 F.2d 1	18
<i>Ryan v. C. B. & Q. Railroad</i> , 59 F.2d 137	17

<i>St. Joseph Stock Yards v. United States</i> , 298 U. S. 38, 51 -----	60
<i>Schechter v. United States</i> , 295 U. S. 495, 546 -----	53
<i>South Carolina Power Co. v. South Carolina Tax Commission</i> , 52 F.2d 515, 524, Affirmed 286 U. S. 525 -----	53
<i>State of Oklahoma ex rel. Phillips v. Guy F. Atkin- son Company</i> , 37 Fed. Suppl. 93, 99 -----	2
<i>Stewart (Charles C.) Machine Co. v. Davis</i> , 301 U. S. 548, 585 -----	56
<i>Texas v. White</i> , 7 Wall. 700, 721, 725 -----	55
<i>United States v. Appalachian Electric Power Com- pany</i> , 23 Fed. Suppl. 83, 91 -----	46
<i>United States v. Appalachian Electric Power Com- pany</i> , --- U. S. ---, 85 L. Ed. 201 -----	46, 47
<i>United States v. Butler</i> , 297 U. S. 1 -----	54
<i>United States v. Chandler-Dunbar Water Power Co.</i> , 229 U. S. 53, 73 -----	47
<i>United States v. Constantine</i> , 296 U. S. 287, 294 ..	60
<i>United States v. Cress</i> , 243 U. S. 316, 322 -----	60
<i>United States v. Doughton</i> , 62 F.2d 936, 938 -----	46
<i>United States v. Gettysburg Electric Railway</i> , 160 U. S. 668, 680 -----	61
<i>United States v. Lee</i> , 106 U. S. 196 -----	17
<i>United States v. Rio Grande Dam & Irrigation Co., et al.</i> , 174 U. S. 690, 709 -----	46
<i>United States v. River Rouge Improvement Com- pany</i> , 269 U. S. 411, 419 -----	47
<i>Utah Power & Light Company v. Pfost</i> , 286 U. S. 165, 179, 182 -----	53
<i>Webster v. Fall</i> , 266 U. S. 507 -----	19
<i>Williams v. Standard Oil Co.</i> , 278 U. S. 235, 241 -----	58

CONSTITUTION.

Constitution of the United States:

Article I, Section 8	13
Tenth Amendment	16, 55

STATUTES

<i>Act of Congress of June 28, 1938, c. 795, 52 Stat.</i>	
1215	2, 65
<i>Sec. 4 of Act of Congress of October 17, 1940, H. R.</i>	
9972 (Public No. 868, Chap. 895, 76th Con-	
gress 3rd Session)	3, 14
<i>Act of Congress of June 22, 1936, H. R. 8455 (Public</i>	
No. 738, 74th Congress) Section 7	23
<i>Article 5, Chapter 70, Oklahoma Statutes 1931, as</i>	
<i>amended by Article 3, Chapter 70, Oklahoma</i>	
<i>Session Laws 1935, and Article 17, Chapter 24,</i>	
<i>Oklahoma Session Laws 1937. Appendix 3</i>	84

MISCELLANEOUS.

<i>House Document 541, 75th Congress, 3rd Ses-</i>	
<i>sion</i>	6, 9, 14, 23, 25, 50, 51, 65
<i>Comprehensive Flood Control Plans. Hearings be-</i>	
<i>fore the Committee on Flood Control, House of</i>	
<i>Representatives, 75th Congress, 3rd Session,</i>	
<i>March 30 to April 19, 1938, pages 24-25</i>	23
<i>Report of Committee on Flood Control 75th Con-</i>	
<i>gress, 3rd Session, (Report No. 2353)</i>	24
<i>Hearings Before Sub-Committee of Senate on Ap-</i>	
<i>priations, H. R. 6260, 76th Congress, 1st Ses-</i>	
<i>sion, p. 201</i>	32
APPENDIX ONE	65
APPENDIX TWO	67
APPENDIX THREE	84

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In the Supreme Court of the United States

No. 832

OCTOBER TERM,

1940.

STATE OF OKLAHOMA ex rel. LEON C. PHILLIPS,
Governor of the State of Oklahoma, *Appellant*,

vs.

GUY F. ATKINSON COMPANY, a Corporation Under
the Laws of the State of Nevada, CLEON A. SUM-
MERS, United States District Attorney for the
Eastern District of Oklahoma, and CURTIS P.
HARRIS, Special Attorney, Department of Justice
of the United States, *Appellees*.

Brief for Appellant

This is a direct appeal from a final decree entered by the United States District Court for the Eastern District of Oklahoma on the 8th day of February, 1941, sustaining a motion to dismiss and dismissing a bill brought by appellant to enjoin the appellee, Guy F. Atkinson Company, a Corporation, from constructing the Denison Dam across Red River within the domain of appellant which would impound the waters of Red River and Washita River, in so far as said waters when impounded would inundate and destroy any of the lands, highways or bridges belonging to appellant or under its jurisdiction and control as a sovereign State, or which

waters, if impounded, would obliterate, change or interfere in any way with the boundaries of appellant, and to enjoin the appellees, Cleon A. Summers, United States District Attorney, and Curtis P. Harris, Special Assistant, Department of Justice, from instituting or conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by appellant or located within its domain, for the purpose of obtaining a site or right-of-way for the Denison Dam or reservoir to be created thereby, in so far as said land sought to be thus acquired is to be used in the construction of the dam and reservoir described and set forth and purporting to be authorized by the Act of Congress passed and approved on June 28, 1938, being H. R. 10618 (Public No. 761, 75th Congress, Chap. 795, 3rd Session) styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes,"

under color of which the appellees are proceeding, and on which they exclusively rely for their authority in all matters alleged in the complaint. It is contended that in so far as said Act purports to authorize the acts of appellees in the matters and things set forth in the complaint that the same is to that extent unconstitutional.

Opinion Below

The opinion of the District Court for the Eastern District of Oklahoma is reported in ---- Federal Supplement, pg. ---, and appears R. 22-31.

Jurisdiction

Petition for appeal was presented to the trial court on February 8, 1941, which appears R. 33-34. An order was made on February 8, 1941, allowing appeal which appears R. 40.

A statement of the grounds on which jurisdiction of this court is invoked has been separately filed in accordance with paragraph 1 of Rule 12 of this court. On March 31, 1941, this court entered an order noting probable jurisdiction.

Questions Presented

This case presents the question of the constitutionality of the Act of June 28, 1938, above mentioned, as appellees are applying and intend to apply the same, in so far as the same relates to or purports to authorize the Denison Reservoir on Red River in Texas and Oklahoma. The specific reference to said Act being:

"The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document No. 541, 75th Congress, 3rd Session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000.00."

Also in connection with said Act there is presented the question of the application and constitutionality of Section 4 of an Act of Congress approved October 17, 1940, H. R. 9972 (Public No. 868, Chap. 895, 76th Congress, 3rd Session) as the appellees are applying and intend to apply the same, which said Section 4 declares:

"The project for the Denison Reservoir on Red River in Texas and Oklahoma authorized by the flood control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods, and for other beneficial uses."

The specific questions are:

1. Whether the complaint states a cause of action, entitling appellant to injunctive relief and this involves the consideration of the questions:
2. Whether appellant has a standing to sue to test the legality and constitutionality of the acts of the appellees done or threatened to be done under color of the terms of the Acts aforesaid;
3. Whether the Acts aforesaid, as the same are being applied by appellees and as appellees intend to apply the same, are for a public purpose within the enumerated or implied powers of Congress.
4. Whether said Acts, as the same are being applied and are intended to be applied by appellees are in contravention of the Tenth Amendment of the Constitution of the United States and contrary to the restrictions implicit in our dual system of government.

STATEMENT OF THE CASE

This action was instituted in the United States District Court for the Eastern District of Oklahoma on September 6, 1940. The appellant, as one of the States of the United States, on the relation of its Governor, sued the appellees and alleged that this is a case or controversy of a civil nature arising out of and involving the validity of an Act of Congress of the United States, being the Act passed and approved on June 28, 1938, hereinabove mentioned, as the same is being applied and is threatened to be applied by appellees. The complaint appears in the record at R. 1-13 and alleges that the appellees solely and exclusively rely upon said Act of Congress for all matters complained of therein.

The complaint further alleges that in a certain cause pending in this court styled: *State of Oklahoma, Complainant, v. State of Texas, Defendant, United States, Intervenor*, 258 U. S. 574, No. 20 Original, decided May 1, 1922, this court settled a controversy then and theretofore existing between the States of Oklahoma and Texas and the United States with respect to the navigability of Red River as to all matters set forth in the complaint, and with respect to the ownership of the bed of Red River, and that in said cause it was adjudged and decreed, among other things, that no part of Red River within the State of Oklahoma is navigable, and that the non-navigability of Red River has remained unaffected since the judgment and decree of said court, and that said stream is not now a navigable water of the United States; that in the same case and in a further order and opinion found in 260 U. S. 606, No. 18 Original, decided January 15, 1923, this court further adjudged and decreed that the boundary between Oklahoma and Texas,

where they are separated by Red River, is along the southern bank of said river which was defined by this court in the following language:

"Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it." 260 U. S. 636.

The complaint further alleges that the opinions, judgments and decrees of this court entered in said cause have been accepted and acted upon by all parties since the rendition thereof and are binding alike upon the State of Oklahoma and the United States.

The complaint further alleges that the part of the Act of June 28, 1938, as aforesaid, referring to the Red River basin refers to the stream involved in the proceedings referred to in the case of *Oklahoma v. Texas* as aforesaid, and that said Act, in so far as it relates to the Denison reservoir in substance, adopts House Document 541, 75th Congress, 3rd Session, and the engineers' report with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, and authorizes and directs the Secretary of War to acquire in the name of the United States titles to all lands, easements and rights-of-way necessary for said dam and reservoir project as outlined in said House Document 541; that as outlined in said House Document 541 there is to be constructed at a point some four or five miles northwest of Denison, Texas, and approximately sixteen miles southwest of Durant, Oklahoma, a huge earthen dam some four or five miles in length on and across Red

River, by far the greater part of which will be and rest upon Oklahoma soil, which dam will form a huge reservoir inundating approximately 150,000 acres of land of which approximately 100,000 acres are located in the State of Oklahoma and in the Oklahoma counties of Love, Marshall, Johnston and Bryan, and that said dam will impound the waters of Red River and Washita River, the last named being a tributary of Red River and wholly an Oklahoma stream.

The complaint further alleges that Red River flows in a southeasterly direction and that said dam is to be located approximately four miles east or below the mouth of the Washita River; that if said dam is built it will inundate approximately 100,000 acres of Oklahoma land the title to which will be taken in the name of the United States of which approximately 3800 acres is owned by appellant State in its sovereign capacity for use as a prison farm and for the support and maintenance of its public or common schools; that said reservoir will destroy many miles of highway and rights-of-way therefor including bridges, all of which are devoted to a public use, namely, travel by the citizens of Oklahoma and other States.

The complaint further alleges that for many years prior to the filing thereof appellant planned and built at great monetary cost an integrated and comprehensive system of highways entirely devoted to public use, a part of which traverses said proposed reservoir both in a northern and southern and eastern and western direction, and that all of said highways and bridges located in said reservoir will be destroyed by the acts and threatened acts of appellees thereby seriously interfering with the strategically located, vital and important

connecting links in the highway system of appellant to its irreparable injury.

The complaint further alleges that the approximately 100,000 acres of land located within appellant's domain which will be inundated is now inhabited by approximately 2000 families, or a total of 8000 people, citizens and residents of Oklahoma; that much of said land is rich soil in a high state of cultivation and is used by the inhabitants thereof as homes and as a means of livelihood; that at least 15,000 acres of the land to be inundated is highly productive of oil and gas on which there are now many large producing oil wells, and said complaint alleges that from recent geophysical and geological surveys at least 50,000 acres of the land to be inundated is underlaid with oil or gas; that extensive drilling operations are now under way for the further development of said lands for the production of oil and gas; that said State derives much of its income for the support of its State government, colleges, University and common schools from a gross production tax levied on oil and gas and that such tax resources will be, as to the lands inundated, destroyed by the construction of the reservoir, and that the loss to appellant State will be great and irreparable in tax revenues to the extent of seriously interfering with appellant in the execution of its governmental functions as one of the States of the American Union.

The complaint further alleges that the annual wealth production accruing to the inhabitants of the proposed basin from agricultural products alone is the sum of \$1,500,000.00.

The complaint further alleges that the waters of Red River and Washita River, after being impounded, are to be taken out of appellant's domain into the State

of Texas, run through conduits located entirely within that State to operate turbines for the generation of hydroelectric power for the purpose of sale principally in the area located in and around Dallas and Fort Worth, Texas. The waters thus to be impounded, largely on appellant's domain, belong to appellant and the taking thereof is without its consent and without compensation.

The complaint further alleges that the scheme for said dam and reservoir as projected in said Act of June 28, 1938, adopting House Document 541, provides for the construction thereof for the purposes of controlling the flood waters of the Red River and Washita River and for the generation of hydroelectric power; that the purposes of said project are under the statutory scheme inextricably and inseverably involved; that as provided by the statutory scheme, a dam is to be constructed 150 feet in height to spillway elevation, being from tailwater elevation 510 feet (sea level) to 660 feet; from elevation 510 feet to 590 feet, there is to be a dead storage pool for waterpower head; from elevation 590 feet to 620 feet there is to be a waterpower reservoir; from elevation 620 feet to 660 feet there is to be a flood control reservoir; from elevation 620 feet to 660 feet there is to be a flood control reservoir which flood control reservoir is to be superimposed on the power reservoir, and the power reservoir to be superimposed on the dead storage reservoir, which last is to be constructed solely in order to give a head for waterpower; that as set forth in the statutory scheme the first 110 feet in height of the dam is to be used solely and exclusively for the development of waterpower, and the superimposed 40 feet is to be used solely and exclusively for the impounding and discharge of flood waters; that the statutory purposes of said project are in no way related to each other

except by the circumstances of being at the same location and being purportedly authorized by the same Act; that the two purposes for which said reservoir and dam are authorized are functionally separate and neither is the incidental or necessary result of the other, that is, that the waterpower feature is not in aid of or related to the flood control feature; that the flood control reservoir as projected in said scheme cannot and will not affect the power feature thereof; that the flood control portion of said reservoir can only be used for the impounding and release of flood waters of Red River and Washita River; that the power reservoir will normally be kept full of water and that it is no part of said statutory scheme nor is it physically possible that the same part of the reservoir can be used for both flood control and waterpower purposes; that as set forth in the statutory scheme or Authorization Act, the waterpower portion of said reservoir is purposefully and separately created at the expense of the utilization for flood control of that part of the reservoir to be used for waterpower.

The complaint further alleges that as is provided in the Authorization Act, the Secretary of War and Chief of Engineers have modified the actual plans so that said reservoir is to be constructed at the following pool levels:

510 feet (sea level) tailwater elevation to 587* feet
for dead storage for waterhead

587 feet to 617 feet for power pool reservoir

617 feet to 640 feet for flood control reservoir

The complaint further alleges that by reason of the modifications of the statutory scheme as aforesaid, said

*Record, p. 7, shows this figure 587 feet instead of 587 feet. The correct figure is 587 feet.

project has been changed from a reservoir inundating 3,400,000 acre-feet for power and 5,900,000 acre-feet for flood control to one for a reservoir inundating 3,080,000 acre-feet for power, and 2,745,000 acre-feet for flood control.**

The complaint further alleges that the appellee, Guy F. Atkinson Company, a Corporation, purporting to act under a contract with the Secretary of War or the Board of Army Engineers or the Chief of Engineers, has now located on the Oklahoma side of the proposed dam a great number of machines consisting of trucks, tractors, steam shovels, drag lines and other equipment, and is now beginning and is engaged in the construction of the dam across Red River which dam, when built, will be of the height set forth and will impound the waters of Red River and the Washita River as aforesaid, inundating and destroying the large acreage of land within the domain of appellant including its own fast lands, and that the building of said reservoir will permanently and totally destroy appellant's fast lands including valuable mineral deposits underlying the same for which it has not received compensation, and will totally and permanently destroy the lands owned by appellant's citizens and render impossible or very expensive the development of oil and gas underlying and which is now being produced from a large acreage of said land, resulting in the destruction of appellant's own taxable revenues and the taxable revenues of its subdivisions of government; that the appellees, Cleon A. Summers, United States Dis-

**In percentage the statutory scheme or Authorization Act devotes 75% of the height of the dam for power and 25% for flood control. As modified 82% of the height of the dam is for power, and 18% for flood control.

In the statutory scheme or Authorization Act 37% of the inundated acre-feet is for water storage for power, and 63% for flood control. The modified plans devote 53% of the inundated acre-feet for water storage for power, and 47% for flood control.

trict Attorney for the Eastern District of Oklahoma, within whose district the Oklahoma part of said reservoir is to be located, and Curtis P. Harris, Assistant to the Department of Justice of the United States of America, have already instituted numerous condemnation suits for the purpose of acquiring the title to various tracts of land within the proposed reservoir, and that it is the purpose of said appellees to institute numerous additional condemnation suits for the purpose of acquiring additional land as right-of-way for said proposed reservoir, all of which lands are located within the domain of appellant.

The complaint further alleges that appellant has at no time given its consent to the acts and threatened acts of the appellees, but on the contrary has made numerous protests and objections to the construction of said project of which protests and objections appellees have actual notice.

The complaint further alleges that as a direct and proximate result of the acts and threatened acts of the appellees appellant will suffer irreparable damage and injury in that:

Thirty-nine subdivisions of its government will be destroyed, consisting of thirty-nine duly and legally organized and existing school districts and townships, and that four counties will be seriously affected by the inundation of a large part of the acreage of land within such subdivisions so that sufficient tax revenues cannot be obtained for such subdivisions to function; that the annual loss of taxable revenues from the land to be taken with no consideration thereof given for the loss of oil revenues, or revenues from agriculture and stock raising, or revenues from personal property taxation will be approximately \$40,000.00; that the acts and threatened acts of appellees

constitute a direct invasion and destruction of appellant's sovereign, territorial and proprietary rights in that its boundary will be destroyed for approximately 40 miles, it will be compelled to surrender its jurisdiction of the territory to be inundated, and the taking of many thousands of its best acres will be in effect a forcible reduction of the area of appellant.

Attached to the complaint is a map showing in detail the contour of the basin as it affects appellant, the school districts affected and the lands taken in each, the highways destroyed with other data material to a consideration of this case. This map appears in the Record p. 14A.

That the fast lands owned by appellant will be taken and its proprietary rights therein extinguished; its highways, including the rights-of-way thereof, bridges, means of communication will be interrupted and in a large measure destroyed and its integrated and comprehensive systems of highways and roads will be interrupted and impaired. Its waters will be taken from it in violation of its laws without the payment or offer of just compensation.

Approximately 8000 of appellant's citizens will be ousted from their homes thereby creating a serious social and economic problem the burden of which will fall largely upon appellant with no measure of compensation offered or afforded.

The complaint further alleges that said Denison Reservoir project as the same is being applied and is intended to be applied by appellees, and under which they are acting and solely and exclusively rely for their acts, is beyond the power of Congress to enact and is not within such powers express or implied conferred by the Constitution of the United States by Section 8, Article 1, or any other provision thereof, and that said acts and threatened acts of appellees constitute an unlawful invasion and destruc-

tion of its sovereign, quasi sovereign, territorial and proprietary rights reserved to it and protected by the Tenth Amendment of the Constitution of the United States.

Upon the filing of this complaint and after service upon appellees they filed their motion to dismiss which is shown Record 15-16. This motion was argued to the court on October 28, 1940, at the conclusion of which the court permitted the plaintiff to file an amendment to its complaint in view of the Act of Congress of October 17, 1940, being Section 4, of H. R. 9972, 76th Congress, 3rd Session. The amendment to the complaint was duly filed and appears Record 17-19 and in substance reaffirms all the allegations of the complaint as to said Section 4 of the Act of October 17, 1940, and alleges that in so far as said Section 4 attempts to declare the project for the Denison reservoir to be for the purpose of improving navigation or regulating the flow of Red River, or for other beneficial uses, the same is without factual basis and in effect is only a self-serving Congressional declaration; that said project as is set forth in the complaint does not in any way protect or improve the navigable portions of the lower reaches of Red River or the Mississippi River either by enriching the low water flow of said rivers as the incidental result of the operation of said flood control and hydroelectric power project except in the intangible, indirect, inconsequential and unsubstantial way set forth and described in House Document 541, 75th Congress, 3rd Session; that said project so outlined and adopted by Congress has no tangible, direct, immediate or consequential effect either for the improvement of navigation or for regulating the flow of Red River, or for other beneficial uses save and except as set forth and described in the aforesaid statutory scheme; that said Act of Congress does not and cannot affect the findings and decrees set forth in the case

of *Oklahoma v. Texas, United States, Intervenor*, as is set forth and described in the complaint. Said amendment further alleges that such inconsequential and intangible benefits to navigation as may result from said project would flow from the flood feature thereof and not the hydroelectric feature thereof.

To the complaint, as amended, appellees filed their motion to dismiss, Record page 19-21, and being in effect the same as the motion to dismiss filed to the complaint before it was amended. A three-Judge District Court was assembled who after hearing argument and on February 8, 1941, filed its memorandum opinion sustaining the motion to dismiss, (Record 22-31) and on the same date entered its judgment of dismissal, the judgment being found in Record at page 32.

SPECIFICATION OF ERRORS

Appellant urges each of the assigned errors* Nos. 1-34, (R. 34-39) inclusive:

Without waiving or limiting any of said assignments, more particularly the trial court erred,

1. In finding, concluding and decreeing that the Acts of Congress in question are constitutional as the same are being applied and are intended to be applied by appellees.
2. In finding, concluding and decreeing that the facts pleaded in appellant's complaint do not state a cause of action and in dismissing the complaint.
3. In finding, concluding and decreeing that the facts pleaded in appellant's complaint fail to show that the Acts of Congress on which appellees solely rely for their acts are not in excess of the powers of Congress to authorize.
4. In finding, concluding and decreeing that the facts pleaded in appellant's complaint fail to show that the acts of appellees are in contravention of its right guaranteed by the Tenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

Appellant has attempted to detail the nature of its argument in the index at the beginning of this brief and believes that a further summary is not necessary.

*Assignments of Error 1-34, inclusive, in fact relate to one error of the court, namely, its order and judgment dismissing the complaint and denying appellant the injunction sued for. The various assignments of error attempt to break down and point out the error of the court in its memorandum opinion in assigning the reasons for reaching the conclusion it did. Appellant deems all of the assignments immaterial and inapplicable except the principal one relating to the assigned error of the court in sustaining the motion to dismiss. These errors have been assigned and are preserved to avoid any technical question should any of them be claimed as material findings or conclusions by implication.

ARGUMENT

Point I.

Appellant has the standing to maintain a suit to enjoin the illegal and unconstitutional acts of appellees and thereby test the Legality and Constitutionality of the Acts of Congress under which they claim to act.

**(Subdivisions (a), (b) and (c) and (d), part one,
Motion to Dismiss)**

The first ground of the motion to dismiss presents the question as to the jurisdiction of the court to proceed because (a) this suit is in reality a suit against the United States without its consent; (b) that no consent has or can be given by the United States to the institution of this suit; (c) the real controversy herein is between the State of Oklahoma and the United States, and (d) the Honorable Henry L. Stimson is a necessary and indispensable party to the proceeding.

Subdivisions (a), (b) and (c) may be discussed under one head. That this is not a suit against the United States, assuming the allegations of the complaint to be true, is sustained by the following decisions of this court:

United States v. Lee, 106 U. S. 196;

Philadelphia Company v. Stimson, 223 U. S. 604, 619;

Ickes v. Fox, 300 U. S. 82, 97;

Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 388;

Ryan v. C. B. & Q. Railroad, 59 Fed. 2d 137;

Franklin Township v. Tugwell, 85 Fed. 2d 208.

Sub-paragraph (d) of the motion to dismiss alleges:

"The Honorable Henry L. Stimson, Secretary of

War of the United States, is a necessary and indispensable party to these proceedings and has not been made a party herein."

It is the settled law as we understand it, that subordinate officers (and the Atkinson Company occupies that position since it is acting under a contract with either the Secretary of War or the Chief of Engineers, see *Ross v. Yearley*, 103 Fed.2d 589,) acting contrary to law cannot escape immunity from suit to restrain their illegal actions by reason of the fact that their superiors are not parties. This has been settled by the following authorities:

Colorado v. Toll, 268 U. S. 228, 230;
Missouri v. Holland, 252 U. S. 416;
Ryan v. Amazon Petroleum Corporation, 71 Fed.2d 1;
Berdie v. Kurtz, 75, Fed.2d 898.

The above authorities sustain the rule for which we contend in this case, and which was followed by the trial court. See Record 25. While it is perhaps true that some of the cases in the lower Federal Courts are in apparent or real conflict, we think that all of the decisions by this court and nearly all of the lower court decisions are easily reconcilable. The principles to be deduced from the authorities in our opinion are:

1. Suit may be maintained against an inferior federal officer without joining his superior to restrain allegedly unlawful acts committed within the jurisdiction of the court unless (a) the relief sought is in fact a mandatory injunction to do something which can only be done on the order of a superior officer who is not a party; (b) the relief sought will in fact control an administrative or quasi judicial discretion vested in the superior officer.

2. A State in particular may maintain a suit against

an inferior federal officer without joining his superior to restrain an invasion of its quasi sovereign rights. The recognition of the superior right of a State to maintain such a suit is not anomalous to but is in accord with the settled principle that a State suing to vindicate its quasi sovereign rights, is more certainly entitled to relief than a private individual, and may insist upon the vindication of its quasi sovereign rights, although, balancing the equities, the court would not grant relief to a private individual.

Georgia v. Tennessee Copper Co., 206 U. S. 230, 237, 238.

In the argument before the court below appellees cited certain authorities in support of this part of their motion to dismiss among which are *Webster v. Fall*, 266 U. S. 507, *Generich v. Rutter*, 265 U. S. 388, in which cases the holding was made that the injunction could not be maintained because of the absence of the superior officer. These and other cases are easily distinguishable from the question presented by the appellant's complaint. One important distinction is they did not involve the right of a State to restrain an unconstitutional invasion of its quasi sovereign authority committed within its domain.

Colorado v. Toll explicitly holds that in such a situation a State may sue an inferior federal officer or employee without joining his superior. This case has never been overruled or modified. In a great majority of instances even a cabinet officer is subject to the direction of the President, and if the reasoning supporting sub-paragraph (d) of the motion to dismiss were sound, no suit could ordinarily be brought except against the President. That would not only be contrary to the entire history of our jurisprudence upon the subject but it would create an in-

tolerable situation both for the President and for litigants.

In the case of *Webster v. Fall*, the relief sought was in fact a mandatory order for the payment of federal money, the payment of which was within the administrative discretion or judicial determination of the Secretary of the Interior.

In the case of *Generich v. Rutter*, the plaintiff sued the State Prohibition Director because he refused to issue permits to the plaintiff for the purchase of quantities of spirits and wine in excess of the limitation fixed by the permit issued by the Commission. While the relief sought was phrased in the form of a request for an injunction to restrain the Director from giving effect to the restrictions in the permit, it is obvious that the relief sought was in fact a mandatory injunction.

In this case, if the relief sought is granted, the Contractor and attorneys would not be commanded to do anything but would merely be restrained from doing an illegal and tortious act within the domain of appellant. Moreover, whether or not the Denison project shall be built is not a question which has been confided to the discretion of the Secretary of War. Congress has directed the building of the project and it is no more necessary to make the Secretary of War a party than it would be to make the members of Congress parties.

Point II.

Appellant as *Parents Patria* has a right to maintain this suit.

(Subdivision (e) of part one Motion to Dismiss)

Subdivision (e) of the motion to dismiss is to the effect that appellant has a plain, complete and adequate remedy at law whereby to find redress for its alleged injuries, and whereby to protect its alleged sovereign, quasi sovereign, territorial and proprietary rights. Appellees contended below, and will perhaps contend here, that appellant can obtain redress for the alleged wrongs as matters of defense against suits in condemnation of its lands or under the Tucker Act for damages.

Appellant is not before the Bar of this court as a private litigant but as a quasi sovereign. The allegations of its complaint show that appellees are violating its sovereign, quasi sovereign and ~~pri~~ proprietary rights in taking its governmental property, the waters of its streams, obliterating its boundary, destroying its subdivisions of government, destroying its highways and transportation system, destroying its tax revenues, taking 100,000 acres of its domain from its sovereignty and jurisdiction, and ousting some 8,000 of its citizens from their homes. No political question is involved in this suit, nor is this suit one for an advisory opinion. Appellant's right as *parents patria* to maintain this action is sustained by the following authorities from this court:

North Dakota v. Minnesota, 263 U. S. 365, 375,
376;

Kansas v. Colorado, 185 U. S. 125, 142;

Georgia v. Tennessee Copper Company, 206 U. S. 230;

proprietary

Oklahoma ex rel. Johnson v. Cook, 304 U. S. 387; *In Re: Debs, Petitioner*, 158 U. S. 564, 583, 584; *Franklin Township v. Tugwell*, 85 Fed.2d 208; *Hudson County Water Co. v. McCarter, Attorney General*, 209 U. S. 349, 355, 356.

In the case of *North Dakota v. Minnesota*, this court refers to:

“The right of the State as *parens patria* to bring suit to protect the general comfort held by, or property rights of, its inhabitants.”

In the case of *Kansas v. Colorado*, the court speaks of the right of the State to invoke:

“The original jurisdiction of this court *** as *parens patria* trustee, guardian or representative of all or a considerable portion of its citizens ***”

In the case of *Georgia v. Tennessee Copper Company*, this court upholds the right of the State to sue “for an injury to it in its capacity of quasi sovereign” and further says:

“In that capacity the State has an interest independent of and behind the titles of its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.”

Point III.

The Denison Reservoir is a multiple purpose project on a non-navigable stream wholly within appellant's domain combining two functionally and physically separate and unrelated purposes.

The Denison project had its statutory beginning in the Flood Control Act approved June 22, 1936, (H. R. 8455, Public No. 738-74th Congress). Section 7 of said Act provides:

"The Secretary of War is hereby authorized and directed to continue surveys, studies, and reports at the following named localities, where, according to the surveys and estimates already made, opportunities appear to exist for useful flood control operations with economic development of hydroelectric power whenever sufficient markets to absorb such power become available, the cost of these surveys to be paid from appropriations heretofore or hereafter made under the authorization in this Act or subsequent similar Acts *** Denison Reservoir, Texas."

Pursuant to the provisions of the above Act the Army Engineers made a further and additional survey as to the feasibility of the Denison project and embodied their report to Congress, which is referred to throughout this proceeding as House Document 541, 75th Congress, 3rd Session. An extensive hearing was held before the Committee on Flood Control of the House of Representatives embodied in the printed report of such hearings referred to as "Comprehensive Flood Control Plans. Hearings before the Committee on Flood Control, House of Representatives, 75th Congress, 3rd Session, March 30 to April 19, 1938." On pages 24 and 25 of said document appears the testimony of General Schley, Chief of Engineers, as to the advisability of combining flood control and hydroelec-

tric projects from which it appears* that the two are essentially in conflict and that the Denison project was recommended for multiple purposes in order to give the project some semblance of economic justification. The Committee on Flood Control, 75th Congress, 3rd session (Report No. 2353) said with respect to his particular project (p. 5-6):

"Only two of the dams in the bill provide for the development of power. These are the Denison on the Red River, which is primarily for flood control, but in accordance with the policy where power and flood control can be combined, provision is made for power at the Denison dam along the Red River. Four states are affected. The other multiple reservoir which provides for both flood control and power is on the New River in West Virginia and is known as the Blue Stone Reservoir."

On page 21, specifically referring to the Denison project, the Committee says:

"Hydroelectric power will be developed at the site, which will benefit two or more states * * *. The total benefits including revenues from the sale of power, justifies the expenditure for the project, particularly

*MR JARRETT: Do you think an hydroelectric dam negatives flood control or helps it?

GENERAL SCHLEY: The two are essentially in conflict to this extent, that the flood control reservoir should be emptied as promptly as possible to make capacity for the next flood. For power or for irrigation, the water is impounded and the reservoir is kept full to the greatest possible extent and for that reason the two are in conflict. However, it is not at all uncommon to have one reservoir superimposed on the other, flood control capacity on top, impounding capacity below, where you have such a suitable site. ***

MR. JARRET: Would you say with the dam not to have hydroelectric either private or government owned:

GENERAL SCHLEY: I would not say that. An example is the Denison project, a combined reservoir. Without the power which it will generate and sell, the dam probably could not be justified. Its cost would be too great for the benefits unless you got the incidental benefit from the sale of power. This is an example of a combination dam in which a reservoir is superimposed on the other."

in view of the rather rapid development taking place in the area."

House Document 541 containing the statutory scheme of the Denison project was adopted by Congress and the project was directed to be constructed "with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable ***. Pertinent provisions of said Act are shown in Appendix one. The same Act of Congress, apparently for the sake of convenience and to greater facilitate the passage of said Act, authorized the construction of many separate projects in sections and upon streams remote and far in distance from the Denison project. For example, projects on the Connecticut River Basin; Marshy Hope Creek, Maryland; Hudson and Mohawk Rivers, New York; Savannah River, Georgia; Ohio River Basin; Spokane River, Washington, and Tanana River, Alaska.

It is a matter of judicial knowledge that most if not all of the projects authorized by the 1938 Act, other than the Denison project, are to be built on navigable waters of the United States. It cannot be claimed that the Denison reservoir is an integral or necessary part of any other project authorized by the 1938 Act, H. R. 10618. House Document 541, which was adopted by Congress, deals with no project other than the Denison reservoir. The recommendations therein contained are in no wise contingent upon or a part of the construction of any other project authorized by the Act.

To assist the court in a clear understanding of the statutory scheme which was adopted by Congress, we will analyze in a brief way the findings and recommendations of the engineers as contained in House Document 541.

A—Schemes and Recommendations of Engineers

The engineers submitted to Congress three plans for a reservoir at this site.

Plan (a) calls for a dual-purpose reservoir for flood control and the development of hydroelectric power. Plan (b) calls for a flood control reservoir only, plan (c) calls for a flood control reservoir with provisions for future power installations. (See p. 6-7 Report of Chief of Engineers, p. 41-57-58-74-79 Report of District Engineers, H. D. 541.)

The reports of the engineers are unvarying in their recommendations that the Denison project be adopted and authorized for two functionally separate purposes, namely, flood control and the production of hydroelectric power. The District Engineer recommended the project in the following brief summary found on p. 79 (H. D. 541) :

"Recommendations. It is recommended that the proposed Denison Reservoir, developed either for flood control and power or flood control only, be classed as a project with benefits and charges approaching an economic balance and that it be so presented for Congressional action with appropriate references to the questions of policy and evaluation of intangibles involved as considered from a national viewpoint; that the preference with respect to economic desirability and adoption, as among the three schemes of development proposed, should be in order of priority, (1) combined power and flood control; (2) flood control with provisions for future installation of power facilities; (3) flood control only."

The Division Engineer, summarizing his report, at p. 94, H. D. 541, says:

"It is recommended that the project be presented to the Congress as one which embraces useful flood control and economical production of power (on the assumption that the flood-control project is to be built in

any event) for which power the development of a suitable market appears probable; as a project which should contribute largely to the prosperity and development of the region which it is designed to serve, and as one which, by judicious adjustment of storage between power and flood control, can probably be made to yield benefits commensurate with costs."

The Board of Army Engineers at p. 12, (H. D. 541) say:

"Subject to the above remarks, the Board recommends the construction of a dam on the Red River near Denison, Texas, for the combined purposes of flood control and the development of hydroelectric power, the project to be constructed in general accord with the plans presented by the district engineer and to be operated as Congress may direct, all at an estimated cost to the United States of \$54,000,000.00."

General Schley, Chief of Engineers, at p. 10 (H. D. 541) says:

"Subject to the foregoing, the Board recommends the construction of a dam on the Red River near Denison, Texas, for the combined purposes of flood control and the development of hydroelectric power, the project to be constructed in general accord with the plans presented by the district engineer and to be operated as Congress may direct, all at an estimated cost to the United States of \$54,000,000.00.

After due consideration of these reports, and of the rapid development which is taking place in this territory, I concur in the views and recommendations of the Board."

B—The Statutory Scheme as Adopted by Congress Has no Real or Substantial Bona Fide Relationship to the Improvement of Navigation

On p. 3 (H. D. 541) General Schley says:

"In the reports on Red River contained in House Document No. 378, Seventy-fourth Congress, which were prepared under the provisions of House Document No. 308, Sixty-ninth Congress, and Section 10 of the flood-control act approved May 15, 1928, the conclusions were reached that the flow of the river, even if conserved and regulated by reservoirs, is insufficient to afford a commercially useful channel without slack-watering by the construction of locks and dams; and, further, that because of the pronounced tendency during floods toward bank caving, the creation of cut-offs, and the formation of high sand bars in the channel, a slack-water navigation improvement would be unsuccessful unless supplemented by a system of reservoirs for the regulation of stream flow."

On p. 13, being the syllabus to the reports of the District Engineer, we find this:

"Irrigation and ~~n~~avigation consideration have only a minor and indirect bearing upon the subject."

In the report of the District Engineer found on p. 65, we find this:

"Jefferson, Texas, which is on Cypress Bayou, an arm of the Red River near Shreveport, Louisiana, was the head of navigation on Red River before the railroads were built ***.

There is now practically no commercial navigation above Alexandria, Louisiana, except for the local commerce on the Jefferson-Shreveport waterway between Morrisport, Louisiana, and Jefferson, Texas."

By way of explanation, Alexandria, Louisiana, is 122 miles above the mouth of Red River. The Denison Dam is to be located 751 miles above the mouth of Red River. On p. 67 the District Engineer says:

"However, even complete regulations of the entire flow passing Denison would not provide adequate depths for year around modern barge navigation in the upper reaches of the river without the provision of other facilities such as locks and dams. There is very little water-borne commerce on the Red River and that is almost entirely confined to the lower part of the river from Alexandria, Louisiana, to its mouth * * *. The only physically feasible navigation improvement for the Red River, providing a 9-foot dependable navigable depth above the mouth of the Black River, would be by locks and dams supplemented by reservoirs. Present or prospective commerce, however, would not justify the cost involved. The construction of the Denison Reservoir would have a favorable effect on open channel navigation by reducing flood stages and increasing low water flows."

On p. 66, (H. D. 541), the District Engineer points out that due to the bars and wide flood plains of the Red River, a system of locks and dams would cause increased flooding of agricultural lands, and further points out:

"A system of locks and dams with reservoirs on the headwaters and/or tributaries to stabilize flow is believed to be the only satisfactory solution to the navigation problem on the Red River. The dam should be of the movable type utilizing either high or low lifts, preferably the former, as that would have a lower first cost and provide better navigable depths."

C—Project Has no Appreciable Effect Upon the Control
of the Flood Waters on the Mississippi.

On p. 13 of House Document 541 the District Engineer says:

"The proposed project would have but limited dependable effect upon flood conditions in the lowest reaches for the Red River or Mississippi except as an added safety factor for existing or proposed flood control facilities."

On p. 77, (H. D. 541), the District Engineer, with respect to this phase of the matter, says:

"Among other so called intangibles or rather benefits difficult of direct evaluation, there might be mentioned the following:

• • •

(g) *Incidental value of reservoir to flood control in the lower Mississippi Valley.*"

On p. 86 is found the views of the Division Engineer on this question in which he says:

"The report finds that with a flood such as 1908 in the Red River, the proposed reservoir would have affected a reduction in flow of about 35,000 cubic feet per second. A reduction of that amount, if long enough sustained, would imply a reduction in stage averaging 1.3 feet between Alexandria and Moncla, and a reduction of 0.15 feet in the flow lines of the Atchafalaya Basin and the main river below Old River, provided they were at peak stage. At lower stages the effect would be greater, but less necessary. In addition, the magnitude of the effect would depend upon the size and origin of the concurrent flood in Red River, and upon the basis of reservoir operation."

The attention of the court is directed at this point to Map 2 of House Document 541 which sets forth the picture of the flood basin of the Red River which this project is intended to benefit. The map outlines the flood basin, not upon the largest known flood of record, which was that of 1908, but upon a mythical flood some three times greater than the flood of 1908 which the engineer "projects" might happen. It will be noticed that the beneficial plain, that is, the plain which this project is supposed to benefit, stops at Alexandria, Louisiana, which is 122 miles above the mouth of Red River or where that stream inflows into the Mississippi. It will thus be seen that under the statutory scheme as adopted by Congress there is nothing probable, tangible or resembling any substantial benefit from this project for the control of flood waters of the Mississippi. No monetary benefit is estimated to result either to the improvement of the navigation of Red River or for control of the flood-control waters of the Mississippi. Instead, the statutory scheme, (H. D. 541), clearly points out that the flood plain stops at Alexandria, Louisiana, which is 122 miles from the mouth of Red River and is above the navigable reaches of Red River so far as water-borne commerce is concerned.

D—Allocation of Cost and Benefits of Statutory Scheme

The statutory scheme separates the cost of the project as between power and flood control. The District Engineer allocates \$38,279,000.00 as the cost of the flood control feature of the project (being the identical estimated cost of flood control alone, Scheme b), and \$15,202,000.00 as the cost of the power feature thereof. (See p. 60 H. D. 541). General Schley, Chief of Engineers, allocates the annual

costs and benefits of the dual-purpose reservoir as follows: (See p. 7)

Annual cost:	Flood control	\$1,864,000.00
	Power	1,643,000.00

Annual benefits:	Flood control	1,767,000.00
	Power	1,705,000.00

In the testimony of General Tyler before the Sub-Committee of the Senate on appropriations on the consideration of H. R. 6260 (the Act to appropriate money to begin construction of this project), he estimates power benefits at \$1,417,000.00, and flood benefits at \$1,594,000.00. (See p. 203 hearings before the Sub-Committee of the Committee on appropriations United States Senate, 76th Congress, 1st Session on H. R. 6260). The benefits which General Tyler estimates would accrue are as follows:

Preventable agricultural damages	\$1,340,000.00
Other preventable damages	258,000.00

(The aggregate of General Tyler's figures is \$1,598,000.00 although he says the total is \$1,594,000.00. This is probably accounted for by reason of some typographical error.)

The statutory scheme (H. D. 541 p. 45), allocates the acre-feet involved in the reservoir as follows:

- (a) Dead storage ----- 1,400,000 acre-feet
- (b) Power pool storage ----- 2,000,000 " "
- (c) Flood pool storage ----- 5,900,000 " "

As the plan is being executed the acre-feet involved in the reservoir are as follows:

- (a) Dead storage ----- 1,020,000 acre-feet
- (b) Power pool storage ----- 2,060,000 " "
- (c) Flood pool storage ----- 2,745,000 " "

E—Intention of Congress with Respect to Flood Control Feature of Project

It was the undoubted intention of Congress that this project should be predominantly for flood control. In the Committee report recommending the passage of H. R. 10618 (Report 2353 p. 21), the Committee says:

“It will have a flood storage capacity of 5,900,000 acre-feet out of a total available capacity of 9,300,000 acre-feet.”

In the statutory scheme adopted by Congress (H. D. 541), General Schley says:

“It appears that not less than 6,000,000 acre-feet of storage are required for effective flood control.

While this volume of storage will not provide full protection to the areas below the dam against floods ap-

*General Tyler before the Sub-Committee of the Senate on appropriations, 78th Congress, 1st Session, on H. R. 6280, and on p. 201 gave the following testimony with respect to this very important and pertinent matter:

SENATOR ADAMS: I have looked over the report, and I am prompted to make some inquiry and ask some questions about the type of the dam and the height of the dam.

GENERAL TYLER: The spillway crest is at elevation 640 above sea level.

SENATOR ADAMS: What is the height of the dam above the river bed?

GENERAL TYLER: The height of the dam is 165 feet. The land flooded at the 640-foot elevation is 35,900 acres in Texas, and 91,700 acres in Oklahoma, or a total of 127,600 acres. The storage, dead and silt storage,—that is, the storage from which you get the power head, and of course that can be partly silted up,—is 1,020,000 acre-feet; the power storage, 2,060,000 acre-feet; flood control storage, 2,745,000 acre-feet; or a total storage below the spillway crest, 5,825,000 acre-feet,

proaching in magnitude the estimated maximum probable flood, any increased allocation to flood control storage would encroach unduly upon the reservoir capacity essential to the successful generation of hydroelectric power and hence is found to be inadvisable from an economic standpoint."

The District Engineer says: (p. 71)

"However, when economic factors are evaluated it appears that the amount of storage allocated to flood control should be about 6,000,000 acre-feet."

The Division Engineer says: (p. 88)

"There are, of course, any number of ways of dividing the available storage. The one selected for study is that which reduces flood storage to 4,000,000 acre-feet, which approximates the volume estimated for the maximum flood of record (1843) whose average frequency is once in 90 to 100 years. This is probably the least flood storage that should be considered."

On p. 6 (H. D. 541), General Schley says:

"Under the scheme of operation proposed by the District Engineer, the upper 5,900,000 acre-feet of capacity between elevation 620 and the crest of the spillway 660 are allocated to flood storage; the 2,000,000 acre-feet between elevation 620 and 595, the latter being the minimum elevation affording a satisfactory powerhead, allocated to power storage; and the remaining 1,400,000 acre-feet below elevation 595 to dead storage."

As shown by the reports of the engineers, the height of the dam from elevation 510 feet (sea level) to 595 feet is for "dead storage" which, according to the reports and rec-

*The complaint alleges that the statutory scheme for the project has been modified so that instead of being one preponderantly for flood control, the same is now one preponderantly for the development of waterpower. (See p. 7-8 Record.)

ommendations of the engineers is for the purpose of creating a waterhead for power. In other words, in order for the force of the water to be sufficient to turn the turbines it is necessary for it to have a sufficient head. This head could be secured in no other way except by using a permanent reservoir for dead storage. The higher the water, the greater the force with which it would run through the turbines. According to the report of the engineers which was adopted by Congress, 5,900,000 acre-feet of the basin is for flood control, and 2,000,000 acre-feet (not including dead storage,*) is for water power. The complaint alleges that as the plan is being executed by the appellees 2,745,000 acre-feet is for flood control, and 2,060,000 acre-feet for waterpower (not including dead storage.) As the plans of the project have been modified and as the same are being executed the percentage of use of the project for flood control has been greatly reduced, and the percentage of use of the project for waterpower has been greatly increased. **

F—Two Purposes of Project are Functionally and Physically Separate

The complaint alleges, and the motion to dismiss admits, that the flood control feature of the project and the waterpower feature of the project are functionally and physically separate. The reports of the engineers, the hearings before the Flood Control Committee of the House,

*Dead storage for waterhead requires 1,400,000 acre-feet (H. D. 541, p. 41).

**The reason for this change is given by General Tyler in his testimony before the Sub-Committee of the Senate on Appropriations (War Department Civil Functions Appropriation Bill 1940 on H. R. 6260, p. 201) where he said :

"Yes; the spillway crest of the dam has been lowered from 660 to 640 feet above sea level, because, after careful study, it is believed that is the most economical height for the best combination of flood control and power."

the report of said Committee, are unvarying that the project was authorized for two functionally separate purposes and is being so executed. The allegations of the complaint show that neither purpose of the project is the incidental result of the other, and in fact the flood control feature and the waterpower feature are physically separate.

That the two purposes of this project are functionally separate is apparent from a casual reading of the statutory scheme, the report of the Committee of the House of Representatives and the testimony before the Committee prior to the adoption of the Act. The picture is aptly given by the Division Engineer wherein he says: (H. D. 541, p. 88)

"In the instant case the flood control storage is above enormous pools of power and dead storage."

The District Engineer says: (H. D. 541, p. 46)

"The gross capacity of the reservoir would really be composed of three parts, permanent storage, power storage, and flood storage. Except during flood periods, the reservoir would not be filled above the normal elevation of the power pool."

The statutory scheme for the project and as the same is being executed, might be compared to a 3-story house, the first story for dead storage, the second story for power and the third story for flood control.

The upper 40 feet of the dam, set apart in the report of the engineers (H. D. 541) for flood control, and the upper 23 feet of the dam as the plans have been modified, set apart for flood control, does not mean that the lower 110 feet of the dam and site occupied by the power project (lower 107 feet as the plans have been modified) are either necessary or useful for flood control. It merely means that if the government is going to construct a pow-

er project occupying all of the site up to 110 feet, it must build 40 feet higher (23 feet higher as the plans have been modified) if it is to provide a flood control project at all at this site.

The statutory scheme provides, and the complaint alleges, that as the project is being built the same embraces two purposes or projects which are not only functionally different and functionally conflicting, but which are also physically separate.*

The power storage, including dead storage, is, according to the statutory scheme, practically a permanent reservoir. The District Engineer on this question says: (H. D. 541, p. 41)

"The power storage in ordinary runoff years would be operated with but a few feet of drawdown below elevation 620. (The top of the power pool. Our insertion), but during drouths the drawdown might be as low as elevation 595 (the top of the dead storage pool. Our insertion), or a maximum of 25 feet."

On page 47 the engineer points out that only during extremely dry years, such as 1909-12, would there be any depletion of the power pool.

The power part of the project does not and cannot provide any reliable flood storage except to the limited and improbable degree as pointed out by the District Engineer that during periods of extreme drouth the power pool might be lowered. If such were the case, then neces-

*On this very point the government attorneys in the case of United States v. Appalachian Electric Power Company, ___ U. S. P. ___, 85 L. ed. 201. (No. 674, October Term, 1939) say in their brief (p. 111 of government's brief):

"There is an inherent conflict of interest between the operation of the dam and reservoir for power purposes and its operation for flood control purposes. For power purposes it is best to have the reservoir always filled to capacity. For flood control purposes it is at times desirable that the reservoir be drawn down to provide storage space for cushioning floods."

The Solicitor General and other Counsel for the government in saying the above, stated a patent fact.

sarily the power pool would have to be filled before the flood control pool would come into operation. The flood control reservoir will be kept empty except when it is temporarily impounding or discharging flood waters. The temporarily retarded flood waters cannot be utilized for the production of commercial power for the runoff would be rapid and not dependable for power use. The same part of the same site cannot be used for both flood control and the production of waterpower. There is a sharp distinction between a flood control reservoir which must be kept empty except when temporarily in use in time of flood, and a navigation pool on a navigable stream where water impounded to create a navigation level necessarily and incidentally creates waterpower. There is no such thing as the incidental creation of commercial waterpower by a flood control project. It is true that in the statutory scheme the engineers relate the cost and benefits of the two functionally separate projects so that to that extent they relate to each other. The District Engineer says: (H. D. 541, p. 32)

"Although this reservoir would approach economic justification if constructed exclusively for flood control, the income from power developed in conjunction with flood control would in part absorb this deficiency since the value of the available power would be somewhat in excess of its cost. It is apparent that the relative amounts of annual return, flood benefits or power revenues, from each of the two functions of a dual-purpose development are quantitatively dependent upon the manner in which storage potentialities of the site are apportioned between these two functions. It is believed, however, that an increased allocation of such storage to flood control at the expense of power would not materially alter the above conclusion except perhaps to show economic deficiencies for both phases of the development."

The Division Engineer says, on p. 88:

"There are, of course, any number of ways to divide the available storage."

On p. 94 the Division Engineer, in order to better the economic feasibility of the plan, reallocates the storage so as to provide 4,000,000 acre-feet for flood control, and 3,900,000 acre-feet for power.

So far as this project is concerned, the flood control and waterpower projects are just as separate as though the projects were being built on separate locations, and just as separate as if a reservoir for dead storage and power were in one location, and a reservoir for flood control in another location.

While in periods of low water, droughts and light rainfall the power storage run-off could conceivably lower the power pool, the engineer states, in ordinary years the power pool would "operate with but few feet of draw-down."

**G—Project Will not Produce Firm Power But Only Power
for Auxiliary or Peak Load Demand for Sale
to an Existing Interconnected Power Company**

The above statement is demonstrated on p. 49 (H. D. 541) where the engineer says:

"As an indication of the project's value for emergency or breakdown service, if made a part of a large inter-connected system, it should be noted that with a full reservoir at the start (power pool full. Parenthesis ours), almost the full amount of the initial installation (75,000 Kilowatts) could be produced continuously, twenty-four hours per day, for about ninety-two days. Under the same conditions, almost a full amount of the ultimate installation, (125,000 Kilowatts) could be produced continuously for about fifty-five days."

On p. 71 the engineer says, with respect to the power feature of the project and the demand for power:

"This demand will be principally for peak power, to meet which demand hydroelectric plants, in conjunction with storage, are practically adapted."

On p. 77 the engineer says under subparagraph (m):

"Sufficient storage would be available to operate on a 24-hour continuous basis, the 75,000 Kilowatt installation for a period of three months."

The statutory scheme projects the water power feature of the project not for the production of firm power (continuous power 24 hours per day), but only for auxiliary or peak load requirements two or three hours per day.

The District Engineer says on p. 49 (H. D. 541):

"For about 12½ per cent of the time, the full initial installation (75,000 Kilowatts) could be operated continuously."

In other words, three hours per day. Greater installation could be operated fewer hours per day.

General Schley, in referring to this same matter on p. 7, speaks of the ability of the project to carry "a definite portion of the peak capacity requirement of the area and thus obviate the need for capital investment in new plants."

The power thus to be produced is projected to be sold into areas centering around Dallas and Fort Worth, Texas.

On this point General Schley says: (p. 7)

"In these comparisons he (district engineer) adopts the potential power revenues . . . with market restricted to the Dallas-Fort Worth area."

The District Engineer says: (p. 62)

"It would appear that the most logical market alternate for the Denison project would be No. 4 or 4-a, the Dallas area."

On p. 71, the District Engineer says:

"The most logical outlet for the power from the Denison project is through the area south of the Red River which is designated in this project as Alternate No. 4. This area centers around Dallas and has transmission lines within twelve miles of the dam site."

The Division Engineer confirms this statement. (See p. 81)

H—Benefits of Flood Control Feature of Project

The District Engineer says (p. 29 H. D. 541):

"**FLOOD DAMAGES:** Flood damages in the Red River Valley are chiefly confined to agricultural lands and crops. In general, there are but few of the works of man such as cities, villages, highway or railway bridges, or even farm buildings in the ordinary flood plain of the river. Some damage to these would be incurred only by great floods such as the maximum probable flood derived in this investigation. The crop damages caused by floods are so extensive in the valley that they constitute a major economic problem to the landowners, tenants and sharecroppers."

He further says that the project will afford flood protection to lands in four states in the following proportion: (See p. 11). Two-fifths to Louisiana and one-fifth each to Oklahoma, Texas and Arkansas.

The largest known flood of record is that of 1908, and it is estimated that this project would give partial protec-

tion to 397,065 acres of cleared land between Denison and Alexandria, Louisiana. (See p. 6). The peak of the 1908 flood in second feet at Denison was 470,000. (See p. 41). The run-off volume of the 1908 flood was 2,712,000 acre-feet. The engineer says that "the floods discussed are those of which a large portion of the run-off originates west of Denison, Texas, and such floods are the only ones which the Denison reservoir would be effective in controlling and alleviating the damage." (See p. 70).

The engineer means by this that as to many disastrous floods caused by the tributaries east or below the dam such as Blue River, Boggy River, Kiamichi River, Little River, in Oklahoma, and the Sulphur and Cypress rivers in Texas, that this reservoir would not be effective.

The District Engineer does not attempt in House Document 541 to set forth the annual damages caused by the floods of 1908, 1915, or 1935, but does say the damages were local and principally agricultural. Apparently the losses from these floods were not sufficient to give sufficient semblance of economic justification for the flood control feature of the project. The engineer then assumed some hypothetical facts and made therefrom some hypothetical calculations. In substance, made a study of some seventy storms which have occurred in the area and estimated that the greatest flood that might reasonably be expected would result from a 3-day rainfall averaging 7.8 inches over the entire basin. (See first paragraph p. 71, and first paragraph on p. 4 H. D. 541). As a result of this hypothetical combination of storms the engineer estimates a superflood having a peak flow at Denison of 1,250,000 cubic feet per second, nearly three times as great as the 1908 flood. The District Engineer says that there was some evidence of a flood of this nature occurring in the year 1843. As a result of this calculation the District Engineer, as well as the Chief of Engineers,

determined that the flood storage of the reservoir should be about 6,000,000 acre-feet (in the modified plans reduced to 2,745,000 acre-feet). The Division Engineer exploded this hypothetical calculation in the following language: (See p. 86)

"It is also difficult to assign a monetary value to the protection which the project would afford against floods of greater magnitude than those of the past 30 years. It is not believed legitimate to assume as the report does that a superflood, transcending all experience, will occur within the next 50 years, and that, in consequence, protection against its assumed ravages may be valued at par in computing benefits. No such flood, or anything approaching it, has ever been known on this drainage area, nor until quite recently, in all probability, had anything like it ever been conceived."

It is on the basis of the hypothetical flood, some three times as great as the flood of 1908, that the annual flood benefits are estimated to be \$1,767,000.00 as shown on p. 7 (H. D. 541). It is on the basis of this mythical flood that highways, railroads and other methods of communication would be interrupted and destroyed; Shreveport and Alexandria, Louisiana, and small towns would be inundated; railroad bridges, highway bridges would be destroyed, air fields would be inundated and other great damage would occur as set forth in Appendix H to House Document 541. Appendix H is referred to in House Document 541 but is not copied nor attached thereto but appears as Appendix two of this brief. The court will observe that under the engineer's estimate of the hypothetical flood that the annual damages calculated are identical with the flood control benefits set forth in the report of General Schley found on p. 7 (H. D. 541).

In the argument on the motion to dismiss, counsel for appellees contended that House Document 541 affords a constitutional basis for Congress to authorize this project for the protection of interstate commerce. This contention was apparently based on the report of the engineers shown in Appendix H. While it must be admitted that floods such as 1908 caused serious damage, we submit that no real or substantial basis is afforded by the engineers' hypothetical flood for any contention that interstate commerce is substantially or directly hampered or interfered with by any flood comparable to that of which we have a reliable record.

I—Much Less of Appellant's Domain Would Be Required for a Flood Control Project Without Waterpower.

We have already pointed out that the engineers submitted to Congress three plans or schemes for the Denison project, the dual or multiple purpose plan, being the one recommended by them and adopted by Congress. On p. 32, House Document 541, the District Engineer says:

“Although this reservoir would approach economic justification if construed exclusively for flood control, the income from power developed in conjunction with flood control would in part absorb this deficiency since the value of the available power would be somewhat in excess of its cost.”

On p. 42, H. D. 541, the engineer says:

“The reservoir, either designed solely for flood control or for flood control initially but with provisions for future power facilities, would have its spillway crest and elevation 640; and based upon the same flood assumptions as outlined for the dual-purpose reservoir the top of the earth dam would be an elevation 675. It is thus seen that there is but 20 feet difference in height of the dams designed

for flood control only, and for the dual-purposes of flood control and power development, as the former requires a dam of about 165 feet in maximum height, and the latter one of 185 feet."

The additional 20 feet in height of the dam made necessary for the multiple purpose project on account of the very flat characteristics of the Red and Washita River valleys and their tributaries forming the reservoir area requires a very much greater acreage of appellant's domain than would a project for flood control only. This is pointed out in considerable detail by the District Engineer on p. 45, H. D. 541. Then the engineer again says:

"For the reservoir created for flood control only a dam is required with top elevation of 675,"

as against a top elevation of 695 feet for flood control and power.

The District Engineer, in giving a summary of the estimated cost of the various schemes, sets forth (pp. 57-58 H. D. 541) that with respect to Scheme (a), being the multiple purpose project, much more land is required than for Scheme (b) for flood control only. While the difference in acreage is not set forth, the land costs are estimated for Scheme (a) at \$8,000,000.00, while for Scheme (b) the land costs are estimated at 25% lower, or \$6,000,000.00. The dam costs for Scheme (a) are estimated at \$10,680,230.00, while for Scheme (b) the dam costs are estimated at \$7,954,900.00. The cost of the regulating-gate structure under Scheme (a) is estimated at \$1,405,300.00, while under Scheme (b) the amount is \$654,290.00. And so on throughout the various items of cost except as to spillway a far less expensive spillway is required for Scheme (a) than for Scheme (b). That

plans (a) and (b) were entirely different plans and wholly in conflict with each other as to nature, purposes and results is apparent from the estimated cost of the two schemes. A much greater acreage of land for the basin would be required for Scheme (a), being the multiple purpose project, demonstrating that the site used for one purpose could not be used for the other.

Point IV.

Congress is plainly without constitutional authority to authorize the forcible invasion and destruction of Appellant's Quasi Sovereign rights, the taking of its domain or own fast lands, roads and bridges for the construction of the water power feature of the Denison Reservoir project.

The full and utmost extent of the constitutional power of the United States with respect to non-navigable waters and the development of waterpower is clearly set forth in the following decisions of this court:

A. Power over water of non-navigable streams.

United States v. Rio Grande Dam & Irrigation Co., et al., 174 U. S. 690, 709;
Leovy v. United States, 177 U. S. 621, 633;
Kansas v. Colorado, 206 U. S. 46, 93;
United States v. Doughton, 62 Fed. (2d) 936, 938;
United States v. Appalachian Electric Power Co., --- U. S. p. ---, 85 L. Ed. p. 201.

B. Power with respect to water power development.

Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Company, 142 U. S. 254, 273;

United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 73; *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 340; *United States v. Appalachian Electric Power Co.*, --- U. S. p. ---; 85 L. Ed. p. 201.

We understand the teachings of the above cases to be that waterpower must come "into being in the operation of works constructed in the exercise of some power delegated to the United States." (*Ashwander Case* cited above). In order that waterpower may constitutionally "come into being" it must be as a result of the exercise of some constitutional power possessed by the United States incidental to and produced by works constructed for navigation or flood control on a navigable water; and those works must be reasonably appropriate for and have a real and substantial relation to either the improvement of navigation or flood control or some other constitutional power of the United States. In the *Appalachian Case* the court was careful to point out that:

"Waterpower development from dams in *navigable streams* is, from the public standpoint; a by-product of the general use of the rivers for commerce."

In the *Appalachian Case* this court condemns the attempt to escape limitations upon constitutional authority by consideraion of "economic feasibility" by designating, as the Authorization Act does with respect to the Denison Reservoir, the project as a multiple purpose one. In that case this court, after pointing out that as to navi-

gable waters the power of the United States is not limited to "control for navigation," says:

"As respondent soundly argues, the United States cannot, by calling a product of its own 'a multiple purpose dam' give to itself additional powers."

That the power of Congress as to "Multiple purpose dams" is limited to navigable waters is clearly pointed out by the reference in the *Appalachian Case* to the decision in *Kansas v. Colorado*, (206 U. S. 46, 85-86). We do not understand the decisions of this court in the TVA or *Appalachian Cases* to mean that the United States may go beyond and outside of its constitutional powers to regulate commerce in the improvement of navigable waters and authorize, as against appellant's consent, the taking of its domain and the invasion and destruction of its quasi sovereign and proprietary rights for the construction of a flood control and power project on a non-navigable stream where, as here, such purposes are functionally separate and neither the incidental result of the other. It seems clear to us from the decisions of this court that there must, first, be a constitutional structure and, second, if as a result of the construction of such there is necessarily and incidentally produced a surplus of water the excess may be used for water-power. Here, as the complaint sets forth and as the statutory scheme and Authorization Act clearly provide, the waterpower feature of the Denison project is both functionally and physically separate from the flood control feature and is wholly unrelated thereto; and if built requires much more of appellant's domain than would be required for a project for flood control. If the argument is made that Congress may, under the interstate commerce or some other power, authorize the construc-

tion of a flood control project at the Denison site*, (foot note attached), and superimpose the flood control structure upon another for waterpower, our answer is that the two being functionally separate and physically unrelated renders the whole Act void. By way of illustration it would be quite as reasonable to contend that since Congress has the constitutional authority to authorize the building of a Post Office that it could, in order to make the building self-liquidating, use the first story for a textile mill and extend the walls sufficiently above the textile mill to provide for the Post Office. Such asserted power would enlarge the powers of Congress far beyond those authorized by the Constitution.

In the argument of this case in the court below, much reliance was placed by counsel for appellees on the case of *Arizona v. California*, 283 U. S. 423, especially in view of Section 4 of the Act of October 17, 1940. We understand the holding of that case to be that a constitutional project or structure is not rendered invalid because incidentally it serves another purpose which may be outside the field of federal power. We also understand the law to be equally clear that this rule applies only; (a) where the constitutional objective is the primary purpose; and (b) where there has been no enlargement of the project or structure beyond the scope of the constitutional objectives in order to achieve an extra constitutional purpose, and (c) where there has been no authorization of additional structures outside the constitutional objective related to it only by the circumstances

*While we do not believe the court need reach this question, we would contend that the Federal Government is without constitutional authority to forcibly and against the State's consent invade and destroy its quasi sovereign, proprietary and other rights to construct a flood control project at the point in question, which project as is shown by the statutory scheme, is primarily, if not solely, for the protection of private property. Congress, by appropriating funds to cooperate with the State or its agencies could constitutionally accomplish such purpose.

of embodiment in a single statutory scheme, and (d) where the non-federal purpose is merely the incidental result of the construction and operation of a constitutional federal structure. This, in effect, was the holding in the *Ashwander Case* and in the case of *Arizona v. California*. This court in the last mentioned case took judicial knowledge that a large part of the Colorado River was formerly navigable and in the footnote the court said:

“The navigability extended as far north as the mouth of the Virgin River and Black Canyon.”

The Denison Dam is to be located some 750 miles from the mouth of Red River which river was held by this court in the case of *Oklahoma v. Texas*, to be non-navigable throughout its reach in Oklahoma, some 200 miles east of the proposed dam. The complaint definitely alleges that Red River is not a navigable stream throughout Oklahoma and that its navigability has remained unaffected since the decision of this court so adjudging in the case of *Oklahoma v. Texas*. The report of the engineers in House Document 541 shows that only a limited stretch of the river east of the Oklahoma line is now or has ever been a navigable water.

Point V.

The Denison Project cannot be sustained under the Interstate Commerce power.

It is only navigable waters which “are subject to national planning and control in the broad regulation of commerce granted the Federal Government.” *United States v. Appalachian Electric Power Company*. It cannot be soundly argued that the multiple purpose of the Denison project situated on a non-navigable water, shown

to be functionally and physically separate and unrelated can be sustained under the interstate commerce power.

Under the doctrine of the Appalachian case, the power of Congress over commerce "is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." However, the purposes of Congress in authorizing the Denison project as we have shown were for two primary purposes, namely, flood control and waterpower. While reference is made in House Document 541 to the project's indirect and inconsequential benefit to commerce, it is clearly apparent that it was not under the commerce power that Congress attempted to authorize it. This statement is fully supported by the report of General Schley (p. 3, H. D. 541).

This report of the Chief of Engineers adopted by Congress makes very apposite the following language of this court in the *Appalachian Case*:

"The District Court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvements would be useful."

In so far as this project would have any effect upon navigation improvements, it will be noted that the estimated costs are reported by the Chief of Engineers to be "far in excess of the probable benefits." The indirect and inconsequential effects of the project upon interstate commerce would be the result of the flood control feature of the project and not the power feature thereof. The complaint as amended is definite in the allegation that the project would have no appreciable effect either for the purpose of improving navigation or regulating the

flow of Red River, and that said project would not in any way protect or improve the navigable portions of the lower reaches of Red River or of the Mississippi River either by enriching the low water flow of said rivers as the incidental result of the operation of said flood control and hydroelectric power projects except in the intangible, indirect and inconsequential way set forth and described in the report of the engineers which was adopted by Congress. Record, pp. 17-18. This court, in the Appalachian case, in approving the opinion of the District Court as to "obvious limits to such improvements as affecting navigability," makes pertinent the language of the District Court's opinion (23 Fed. Suppl. 83, 91), wherein the court said:

"*** the fact that any river may in any portion in its course be navigable and subject to such control as the United States may have over navigable waters, does not invest every tributary of such river with the same status. To hold otherwise would be to extend the status of a navigable water, with all the consequences thereof, to the remote sources of the tributary streams, the mountain brooks, and spring branches which are the ultimate sources of so many of our great rivers."

The attention of the court is here directed to the map of the Denison project basin attached as an exhibit to the complaint. Record, p. 14A. This map shows that the lower reaches of the Washita River Valley, which river is wholly an Oklahoma stream and no part of which was ever navigable, is to be inundated for many miles upstream thereby inundating a very extensive oil field and destroying many subdivisions of appellant's government.

No government buildings, lands or other property are involved. Only private property is to be protected

by the flood control feature of the project. The statutory scheme sets forth that the project, neither the flood control feature nor the power feature, has ~~any~~ substantial relation to either interstate commerce itself or an instrumentality of that commerce. It must be admitted that *neither* the floods or waters which flow down the Washita River and Red River at the point in question or west or above the dam, or for many miles east or below the dam, are used or capable of being used as an instrumentality of interstate commerce. It must also be admitted that the private property to be protected in four States, Oklahoma, Texas, Arkansas and Louisiana, does not of itself constitute interstate commerce:

The generation of electric power constitutes no part of interstate commerce.

Utah Power & Light Co. v. Pfost, 286 U. S. 165, 179, 182;

South Carolina Power Co. v. South Carolina Tax Commission, 52 F.2d 515, 524; Affirmed 286 U. S. 525.

"Commerce succeeds to manufacture and is not a part of it."

Cornell v. Coyne, 192 U. S. 418, 428, 429.

To hold that this project as authorized and as appellees are executing the same, has a direct and substantial relation to the interstate commerce power of Congress would, in effect, be to hold as was expressed by this court in the case of *Schecter v. U. S.*, 295 U. S. 495, 546, that the "federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

See also *National Labor Relations Board v. Jones and Laughlin Corporation*, 301 U. S. 1, 30.

Point VI.

The Denison Project as the same is being applied by Appellees and in so far as authority is claimed for the taking and destruction of Appellant's Quasi Sovereign, proprietary and boundary rights, cannot be sustained under the general welfare clause.

United States v. Butler, 297 U. S. 1;
Carter v. Carter Coal Company, 298 U. S. 238,
 296;
Kansas Gas & Electric Co., v. City of Independence, 79 F.2d 638;
Greenwood County v. Duke Power Company, 81 F.2d 986.

It cannot be soundly argued that since the general welfare clause grants Congress the power to spend money for the general welfare, that such power is to be extended by implication into an independent grant of power instead of as was held in the above authorities, a limitation on the taxing power. The above cases are clear and unmistakable in the holding that no substantive grant of authority is conferred by the general welfare clause. These cases point out that the power granted is to levy taxes which tax money, when collected, may be expended in the discretion of Congress for the general welfare. If the general welfare clause is construed to be a substantive grant of authority, the power of Congress is unlimited and the remainder of the Constitution is largely surplusage.

Under such a construction the States would be reduced "to little more than geographical subdivisions of the National domain." (*Carter v. Carter Coal Company*).

"To construe the provision respecting taxation as authorizing any federal governmental action involving the expenditure of tax moneys, or any federal

legislation, that would promote the general welfare, would in effect make the general welfare clause there-in a general grant of power, and would open the door to wide encroachment on the reserved powers of the States."

(*Kansas Gas & Electric Company v. City of Independence.*)

Point VII.

The Denison Project as authorized by Congress, and as the same is being applied by appellees, is in contravention of the Tenth Amendment of the Constitution of the United States and the restrictions implicit in our dual form of government.

A. Plaintiff would lose jurisdiction over, and its subdivisions of government would lose the right to tax the land to be taken.

United States v. Unzenta, 281 U. S. 138, 142;
Bowen v. Johnston, 306 U. S. 19, 23, 28.

B. The boundary of appellant would be obliterated for 40 miles, its quasi sovereign rights destroyed, its area forcibly reduced contrary to the holdings of this court in the following cases:

City of New York v. Miln, 11 Peters, 102, 138;
Rhode Island v. Massachusetts 12 Peters, 657, 733;

Texas v. White, 7 Wall. 700, 721, 725;
Ashton v. Cameron Water Improvement District, 298 U. S. 513, 531;

Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U. S. 315;
Carter v. Carter Coal Company, 298 U. S. 238, 295.

The complaint alleges the invasion and destruction by appellees of rights and powers essential to appellant's quasi sovereign existence. The acts of appellees, unless restrained, require a surrender by appellant of "restrictions implicit in our federal form of government." *Charles C. Steward Machine Co., v. Davis*, 301 U. S. 548, 585.

C. Appellant has a well defined statutory program for the conservation of its waters and water resources with which the Denison project directly conflicts.

The pertinent portions of the Oklahoma statutes with respect to its waters and water resources are attached as Appendix three. It will be seen from an examination of the statutory laws of appellant that it has enacted adequate laws and set in operation adequate agencies for the conservation of its natural resources including the waters of its streams, its soil and the promotion of moisture. This program is declared a public necessity for the preservation of the habitability, productivity, health, comfort, sanitation, convenience and public utility of the State of Oklahoma and the people thereof.* By virtue of said statutes appellant has created its Planning and Resources Board to promote the control of floods within the State and to promote the conservation and use of its waters. Said Board has express authority to grant permission to develop available waterpower and to negotiate contracts with the Federal Government or any department thereof, or with any State, for the purpose of obtaining assistance and cooperation in the accomplishments of the purposes of flood control and water conservancy and use in the State. The appellee, Atkinson Company, in constructing the dam across Red River within the State of Oklahoma as a flood control and hydroelectric project, is acting without

*Section 2, Article 3, Chap. 7, Oklahoma Session Laws 1935, copied in Appendix.

the permission, consent or approval of appellant and contrary to appellant's plan for the conservation and development of the waters of the Washita River and Red River. Appellant is a semi-arid State and has adopted laws relating to the appropriation and use of water similar to those adopted by the arid States further west. Because appellant is a semi-arid State it stresses the importance of retaining and justifying its rights to regulate and control the use of its waters, which rights are attempted to be violated by the acts of appellees. Of particular importance in this connection, appellant has expended a considerable sum of money in making surveys of the Washita and Red Rivers, and in formulating a comprehensive plan for the conservation and development of the waters of said streams.

On March 18, 1936, in Cause No. 15,484, in the District Court of Grady County, the court decreed all territory on both sides of the Washita River, which includes counties and parts of counties lying in the watershed of the Washita River composed of the counties of Carter, Marshall, Johnston and Bryan, and other counties of Oklahoma, to be and constitute the Washita Soil and Water Conservancy District No. 1. This was done in compliance with the State statute, and the work is going forward. The acts and threatened acts of appellees, unless restrained, will nullify and set at naught the declared public policy of appellant, and such acts are, as appellant believes and alleges, in derogation of powers rightfully belonging and reserved to it. It is insisted here that the power or right to regulate and control the flood waters of the State, including the Washita and Red Rivers, and to develop the water resources thereof, said streams being non-navigable are not powers delegated to the Federal Government by the Constitution of the United States. Consequently, ap-

pellees have no authority to do the acts complained of and such acts constitute a direct invasion of the quasi sovereign rights of appellant to regulate its internal affairs.

Point VIII.

Since the statutory scheme purposefully, inseverably and inextricably unites two functionally separate and independent projects, one being for the generation of water-power, clearly beyond the power of Congress to enact, the whole Act falls.

Howard v. Illinois, et al., R. R. Company, 207 U. S. 463, 501; *Williams v. Standard Oil Company*, 278 U. S. 235, 241.

The above cases announce the rule uniformly applied by this court. We have shown in the preceding portions of this brief that Congress, in authorizing the Denison project, purposefully authorized the same for two unrelated purposes neither being the incidental result of the other. The purpose of Congress in thus authorizing the project was as is stated in the report of the engineers and the report of the House Committee on flood control, to give the project some semblance of economic feasibility. Under such circumstances it must be admitted, we believe, that "the presumption is that Congress intended the Act 'to be effective as an entirety' ". (*Williams v. Standard Oil Company*.)

Point IX.

The declaration by Congress that this project is for the purpose of improving navigation, regulating the flow of Red River, controlling floods and other beneficial uses is not binding on the Courts and does not preclude a judicial inquiry as to the facts.

Section 4 of the Flood Control Act of June 28, 1938, (52 Stats. 1215) shown as Appendix one, provides in substance that the works and improvement therein authorized are "for the benefit of navigation and the control of destructive flood waters and other purposes."

Section 4 of H. R. 9972, 75th Congress, 3rd Session, approved on October 17, 1940, provides, in substance, that the project for the Denison reservoir "is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods and for other beneficial uses."

The trial court was of the opinion that Section 4 of the Act of October 17, 1940, is in no substantial particular different from that of Section 4 of the Act of June 28, 1938. "It is merely a bit more specific. * * * In substance they mean the same."

The court below was of the opinion that it could not "go behind the express purpose of an Act of Congress and say that it was not enacted for that purpose as long as the means provided are not unrelated to the express objects of the legislation."

The complaint as amended specifically challenged the declared purposes of Congress with respect to this project for lack of factual bases. In so far as Section 4 of the 1938 Act is concerned, the same is general in its nature and could not, we believe, be held to apply to the

Denison project since such project was covered by an independent and unrelated portion of the Act.

The recommendations of the engineers (H. D. 541) refer to no other project and recommend the Denison project for two purposes, namely, flood control and water-power. The designated purposes and designated structural and functional characteristics of the scheme are clearly set forth. "Specific terms prevail over the general in the same or other statutes which might be otherwise controlling."

Ginsburg v. Popkin, 285 U. S. 204, 208;
Connecticut Railway & Lighting Co., v. Palmer,
304 U. S. 493;
Kepner v. United States, 195 U. S. 100.

Section 4 of the Act of October 17, 1940, relates specifically to the Denison project. To say that Congress can declare a project to be within its power and by legislative fiat proclude any inquiry would destroy the constitutional functions of the courts.

Mugler v. Kansas, 123 U. S. 623, 661;
Cherokee Nation v. Southern Kansas Ry. Co.,
135 U. S. 641;
Minnesota v. Barber, 136 U. S. 313, 319;
Mountain Timber Company v. Washington, 243,
U. S. 218, 237;
United States v. Constantine, 296 U. S. 287,
294;
St. Joseph Stock Yards v. United States, 298
U. S. 38, 51.

Where a question of federal authority arises, navigability is a constitutional fact.

United States v. Cress, 243 U. S. 316, 322;
Crowell v. Benson, 285 U. S. 22, 55.

We, therefore, submit that Congress may not, under the interstate commerce clause, or any other power, declare this project to be in aid of navigation, or any other federal purpose, and thereby preclude a judicial inquiry as to the facts.

Point X.

~~The Motion to Dismiss which was sustained by the Trial Court admits all facts well pleaded.~~

Polk Company v. Glover, 305 U. S. 5, 9.

Point XI.

~~Power to condemn property exists only for public use, and a purpose outside of the constitutional power of Congress is not a public use.~~

Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 251.
United States v. Gettysburg Electric Railway,
 160 U. S. 668, 680.

In the case of *Hairston v. D. & W. Railroad Company*, 208 U. S. 599, 606, this court said:

"The courts of the states, whenever the question has been presented to them for decision, have, without exception held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. * * * ."

The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

Federal courts will determine for themselves quite apart from any legislative declaration, whether the purpose for which Congress has in form authorized condemnation proceedings, is within the Constitutional power of the United States. Thus in *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 657, this Court said:

"It is not necessary that an Act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution."

CONCLUSION

Counsel believe that the complaint states a cause of action entitling appellant to relief, and that it was error for the trial court to sustain the motion to dismiss and enter its order denying the injunction and dismissing the complaint.

This case presents questions which go to the very existence of our federal system of government. If Congress can constitutionally authorize the taking of approximately 100,000 acres of appellant's domain, destroy its quasi sovereign rights including more than thirty of its subdivisions of government under the guise of exercising some constitutional power, there could not well be left any power or right of appellant which Congress could not invade and destroy. If Congress can constitutionally authorize the taking of 100,000 acres of appellant's domain, with the attendant consequences alleged in the complaint, it could authorize the taking of one million acres, or as to that the whole State, and wholly destroy appellant as one of the United States. The application of the Act of Congress authorizing the Denison project strikes at vital

prerogatives of appellant and attempts to authorize an invasion of its rights which have heretofore been thought beyond the power of the National Government. It would be hard to conceive of an act calling for a more direct surrender of the powers essential to appellant's quasi sovereign existence.

Respectfully submitted,

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APPENDIX ONE

Pertinent provisions of the Act of June 28, 1938, c. 795,
52 Stat. 1215, are as follows:

SEC. 4. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: *Provided*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission.

The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000

The Government of the United States acknowledges the right of the States of Oklahoma and Texas to continue to exercise all existing proprietary or other rights of supervision of and jurisdiction over the waters of all tributaries of Red River within their borders above Denison Dam site and above said dam, if and when constructed in the same manner and to the same extent as is now or may hereafter be provided by the laws of said states, respectively, and all of said laws as they now exist or as same may be hereafter amended or

enacted and all rights thereunder, including the rights to impound or authorize the retardation or impounding thereof for flood control above the said Denison Dam and to divert the same for municipal purposes, domestic uses, and for irrigation, power generation, and other beneficial uses, shall be and remain unaffected by or as a result hereof. All such rights are hereby saved and reserved for and to the said States and the people and the municipalities thereof, and the impounding of any such waters for any and all beneficial uses by said States or under their authority may be as freely done after the passage hereof as the same may now be done.

APPENDIX TWO**APPENDIX H TO HOUSE DOCUMENT 541.**

The pertinent portions of Appendix H, referred to but not printed in House Document No. 541, are as follows:

III. Flood Damage.

1. *Introduction.*—The principal loss caused by floods in the Red River valley is that to crops. The usual flood occurs late enough in the season to prevent a new crop of cotton from maturing and for other crops, on the average, not more than half a crop can be harvested after a flood. Some loss of this kind as well as bank caving and various intangible losses occur even with minor floods. If the so-called "project" flood or maximum probable flood were to occur under present conditions the loss would be enormous. Bridges would be washed out, levee districts and towns inundated, and much property damage done. The following paragraphs describe the estimates of the monetary value of these losses.

2. *Crop losses.*—In determining the average crop production per acre, actual figures were obtained from the County Agents of Lamar, Red River, and Bowie Counties, Texas; McCurtain County, Oklahoma and Little River and Miller Counties, Arkansas. The figures were compiled from representative farms in each county and pertained only to land lying in the alluvial valley. In addition to these statistics, numerous representative farmers operating in Texas, Oklahoma, Arkansas, and Louisiana were interviewed and figures were obtained which showed the actual production. These records showed the average productions to be as follows:

Cotton, 200 pounds per acre above Index.

Cotton, 250 pounds per acre below Index.

Corn, 30 bushels per acre, entire valley.

Mixed hay, 1 ton per acre, entire valley.

Vegetables, variable.

As it was impracticable to use every individual item in compiling this estimate, only the major crops were considered, and only two headings were used for them, namely: "Cotton" and "Other Crops." However, as "Cotton Seed" represented a major item by itself, there being approximately one-half ton of seed to a bale of cotton, it was decided to assign it a separate heading.

Crop acreage figures, furnished by the various County Agents in the three states affected, indicate that 60 per cent of the cultivated area between Denison and Index is normally planted in cotton, the remaining 40 per cent being in other crops. For the area between Index and Alexandria the percentage are 70 per cent and 30 per cent, respectively. This additional 10 per cent in cotton crop for the lower valley is explained by the fact that the levees offer protection which makes an increase in the major crop profitable.

The price used for cotton was arrived at thus: After the war, cotton was selling for around fifteen to eighteen cents per pound. However, during the depression years, cotton sold as low as four and five cents per pound. As neither the high nor low prices were representative of normal years, a price of thirteen cents per pound was assumed to be a fair figure.

As the five to six-dollar per bale cost of ginning was not included in the charges against cotton production, and as the farmer usually pays the ginner for the cost of ginning with cottonseed, this expense was deducted from the seed value.

In 1936, cottonseed sold for thirty-four to thirty-five dollars per ton. In March 1937 it was selling for forty dollars per ton, but during depression years it sold at a much

lower price. Thirty-two dollars per ton was selected as a conservative figure.

As the ratio of cotton seed to lint is 2 to 1, a 500 pound bale of cotton will produce 1,000 pounds of seed, or $\frac{1}{2}$ ton.

One-half ton of seed at \$32 less \$6 for ginning equals \$10, which is the net value used for the seed from one bale of cotton. This is equivalent to \$20 per ton of seed. The value of "Other Crops" per acre was determined as follows:

80 per cent of area in corn, wheat, oats, and rye,

@ \$25 per acre -----	\$20.00
1 per cent of area in vegetables, @ \$100 per acre --	1.00
4 per cent of area in alfalfa, @ \$80 per acre -----	3.25
15 per cent of area in mixed hay, @ \$12 per acre --	1.80
Total average per ac. "Other Crops"-----	\$26.00

As only one-half of the crop was assumed to be lost one-half of \$26, or \$13 per acre, was used.

Actual records at Denison cover a period of 30 years, 1906-1936, inclusive. During this period three floods occurred that would cause damage; namely, 1908, 1915, and 1935. As the 1915 flood had several peaks and a study of damage attributed to flow above Denison was very difficult to determine, it was assumed that it caused a damage equal to that of 1935. Therefore the annual damage by floods for the period of record was 1908 damage plus 1935 damage times two divided by 30.

The loss caused by the Project Flood assumed to occur once in the economic life of the Project, or once in fifty years, was divided by fifty in order to determine the annual loss.

The greater portion of the uncultivated area in the valley is used almost exclusively for pasture. When inundated by floodwaters the timber is not damaged, but the grass is covered with silt, making it necessary to feed

the livestock for an indefinite period; low places are left full of water, which at times require months to dry up; and large quantities of drift are deposited which must be cleaned up. It is difficult to place an exact amount on these damages, but the various studies indicate that annual benefit of 4 cents per acre is a fair figure.

A summary of the computations of average annual crop loss is given in Table No. 1.

3. *Flood damage other than crops.*—The project flood is of such nature and size that if it is allowed to go down the river uncontrolled it will cause enormous damage to all that lies in its path. The 1908 flood uncontrolled would also cause damage, but to a much lesser degree since many structures and improvements have been built with the 1908 high-water elevations as a guide.

The following flood-damage figures are in most cases only for the Project Flood which was considered to occur once in 50 years. Where similar damage to a lesser degree occurs for the other floods studied it is incorporated and the amount noted as such.

4. *Business buildings (buildings and merchandise).*—The business section of Alexandria would be covered by seventeen feet of water and it is located so that there would be a strong current through it. Also a number of small towns would be inundated. The probable loss to buildings and merchandise was estimated at \$1,200,000.

Annual	-----	\$24,000
--------	-------	----------

5. *Residence buildings (buildings and contents).*—This loss was divided into city and rural section as noted below. Cities

Shreveport, 50% inundated.

Alexandria, 100% inundated.

Fulton, Garland, Coushatta, Bossier City, Colfax, and small towns inundated.

Population

Shreveport, 50% -----	40,000
Alexandria -----	24,000
Other small towns -----	16,000
	<hr/>
	80,000

$80,000 \div 5 = 16,000$ homes at \$125 damage to building and \$75 damage to furniture ----- \$3,200,000
 Barksdale Field, Louisiana ----- 100,000

Farms:

560,000 acres, one building to 40 acres, 14,-	
000 buildings at \$50 -----	700,000
	<hr/>
	\$4,000,000

Annual ----- 80,000

6. *Factories and municipal plants.*—Shreveport has a number of manufacturing plants that would come within the area flooded. Lumberyards and mills would be inundated at Alexandria. Damage to buildings, equipment, and materials was estimated at \$1,000,000. Annual \$20,000.

One-half of the streets of Shreveport, all of the streets of Alexandria, and a number of small towns along the river would be inundated. No damage was estimated for streets other than pavement. It was estimated that 90 miles of pavement would be damaged in the amount of \$5,000 per mile, or a total of \$450,000. Annual \$9,000.

7. *Sewers.*—Sewer systems in Shreveport, Alexandria and Bossier City would be affected by the high water. The amount of damage was placed at \$150,000. Annual \$3,000.

8. *Highways.*—Between Fulton, Arkansas, and Alexandria, Louisiana, there is approximately 500 miles of paved or improved road that parallels or is adjacent to the Red River and is subject to overflow. Also there is ap-

Table No. 1.—Average annual crop dam-

Flood designation	Peak Discharge at Denison c.f.s.	Above Index	
		Cleared Acres Flooded	Clear Acre Protected
Project:			
Natural -----	1,245,000	263,468	-----
Modified -----	210,000	153,163	110,3
1908:			
Natural -----	471,000	233,468	-----
Modified -----	55,000	15,316	218,1
1936:			
Natural -----	186,000	153,163	-----
Modified -----	55,000	15,316	137,8

Annual Crop Damage

Project Floods:		
Total damage -----	\$17,222,770	60%
Annual damage 1/50 -----	\$ 344,455	
Damage in 30 years:		
1908 -----	10,455,352	40%
1935 x 2 -----	8,512,630	
Total -----	\$18,967,982	
Annual 1/30 -----	632,266	
Wooded land, 770,350 acres @ 4c --	30,814	
Total annual crop damage		\$1,007,535

new reservoir on Red River at Denison, Texas.

Slow Index		Denison-Alexandria		
of dion	Cleared Acres Flooded	Cleared Acres Protected	Total Value of Protection	Total Protection
-- 76	658,748 172,390	----- 486,358	\$14,663,694	\$17,222,770
-- 26	326,353 147,440	----- 178,913	5,394,226	10,455,352
-- 50	172,390 137,290	----- 35,100	1,058,265	4,256,315

A values per acre	Average crop values per acre
on:	70% of area in cotton:
20 ----- \$15.60	250 lbs. @ 13c ----- \$22.75
Coper acre ----- 2.40	Cottonseed \$5 per acre ----- 3.50
over crops:	30% of area in other crops:
\$250% loss ----- 5.20	\$26 per acre & 50% loss ----- 3.90
Avalue per acre.. \$23.20	Average crop value per acre.. \$30.15

proximately 12 miles of pavement crossing the alluvial valley at Fulton, Garland, and Shreveport. This pavement would be subject to rather heavy damage.

Fulton to Alexandria, 300 miles at \$2,500 ----- \$750,000
 Crossings at Fulton, Garland, and Shreveport,
 12 miles at \$10,000 ----- 120,000

Total -----	\$870,000
Annual -----	17,400

9. *Bridges.*—Costs of construction of the bridges were used where available. In other cases weights of material in bridges were computed or estimated and the value of the bridge found by arriving at a unit price per foot of length of bridge.

Approaches to the bridges include embankment and pavement or track subject to overflow by project flood. It was assumed all bridges down to and including Index, Arkansas, would be destroyed.

Highway bridges:

Denison -----	\$200,000
Sowells Bluff (under construction) -----	300,000
Arthur City -----	120,000
Index -----	180,000

	\$800,000

Toll bridges at Telephone and Denison, Texas, including approaches -----	\$120,000
Highway approaches, four @ \$40,000 -----	160,000

Railway bridges:

Denison, M. K. T. -----	1,031 feet
Carpenters Bluff, K. O. and G. -----	1,100 feet
Arthur City, Frisco -----	858 feet
Index, K. C. S. -----	1,200 feet

4,189 feet at \$187 -----	\$ 783,000
Railroad approaches, four at \$30,000 -----	120,000

Miscellaneous:

Cost of temporary structures, railroad -----	\$250,000
Cost of temporary structures, highway -----	150,000
	<hr/>
	\$2,383,000

Annual -----	47,660
--------------	--------

10. *Railroads.*—The railroads would have heavy damage to track in the lower valley in addition to loss of bridges. A number of cars placed on bridges to weight them down would be lost, also freight in cars standing in yards would be damaged. This was estimated as follows:

Tract adjacent to river, 250 miles @ \$5,000 -----	\$1,250,000
Cars lost with bridges, 200 @ \$5,000 -----	1000,000
Loss to freight in yards, 200 @ 1,000,000 lbs. capacity, 5c lb., or \$5,000 per car -----	<hr/> 1,000,000
Total -----	\$3,250,000
Annual -----	65,000

11. *Farm Machinery.*—River water covering farm machinery would cause material damage, especially equipment such as tractors, motors, etc.

Tractors, approximately 1 to 1,000 acres—500 at \$50 -----	\$25,000
Machinery (mowing machines, binders, etc.) -----	5,000
Miscellaneous (pumps, lighting units, etc.) -----	20,000
Total -----	\$50,000
Annual -----	1,000

12. *Livestock.*—The project flood is of such magnitude that the majority of high points in the valley where

stock would naturally be gathered would be completely inundated. As this flood would come with very little warning, time would not permit the removal of this stock to safety. The 1908 Hypothetical Flood, in all probability, would not create such an enormous loss to livestock as the majority would be able to reach the various islands left in the overflow. The Project Flood, therefore, is the only one being considered.

Mules and horses (approximately 20,000 in the valley) : 1,500 lost @ \$100 each	\$150,000
Cattle (approximately 50,000 in the valley) : 10,000 lost @ \$40 each	400,000
Hogs (approximately 15,000 in the valley) : 3,000 lost @ \$5 each	15,000
Sheep and goats (approximately 15,000 in the valley) : 3,000 lost @ \$4 each	12,000
Chickens and turkeys (approximately 210,000 in the valley) : 105,000 lost at 50c each	52,500
Total	\$629,500
Annual	12,500

13. *Relief (care of destitute).*—With the loss and destruction of practically the entire crop in the valley, an enormous number of farm tenants would be made entirely destitute. As the tenant population is composed almost entirely of Negro and poor white classification, they would, of a necessity, have to be placed on relief.

10,000 families for six months at \$10 per month	\$600,000
Annual	12,000

14. *Ginning Losses.*—The average cost of ginning was assumed to be \$6 per bale. The loss is directly chargeable against the flood because a loss of cotton means a corresponding loss to the ginner, for, had the cotton crop been

made, he would have ginned it. The actual cost of fuel and damage to machinery, from ginning, was assumed to be \$1.50. This amount deducted from \$6.00 represents the anticipated loss per bale, or \$4.50.

Project Flood, 201,057 bales at \$4.50	\$905,757
Annual	18,095
30-year damages, 200,621 bales at \$4.50	902,795
Annual	30,093

15. *Loss to railroad companies (hauling cotton).*—The various railroad companies operating in the vicinity of the Red River Valley anticipate a certain volume of business, each year, from this area, and consequently maintain the necessary facilities for handling it. In the event of a major flood, the crops are destroyed and the railroad loses the entire transportation. As Texarkana, Texas-Arkansas, is located approximately midway between Denison and Alexandria, it was assumed that the freight rate from there to the various destinations, particularly New Orleans, Louisiana, or Galveston, Texas would be representative.

Project Flood:

Cotton 201,057 bales at \$1.55 per bale	\$ 311,638
Cottonseed, 100,529 tons at \$7.20 per ton	723,809

Total	\$1,035,447
Annual	20,709

30-year damages:

Cotton, 200,621 bales at \$1.55 per bale	\$ 310,963
Cottonseed, 100,311 tons at \$7.20 per ton	722,239

Total	\$1,033,202
Annual	34,440

16. *Loss to railroad companies (rerouting trains).*—

The project flood would be of such magnitude that every railroad bridge which crosses Red River would be washed out to and including the one at Index, Arkansas. This condition would necessitate the rerouting of trains until such time as suitable crossings could be erected. It is assumed that the nearest available crossing is at Fulton, Arkansas. Denison, M. K. T., 10 trains per day at 500 miles

each ----- 5,000

Carpenters Bluff, K. O. & G., 5 trains per day at 500 miles each ----- 2,500

Arthur City, Frisco, 5 trains per day at 350 miles each ----- 1,750

Index, K. C. S., 10 trains per day at 50 miles each ----- 500

Total miles ----- 9,750

9,750 train miles at \$3.15 per mile for 30 days ----- \$921,375

Annual ----- 18,428

17. *Bank caving.*—Bank caving occurs when the river is above one-half bank full stage. From a study of levee practice in the lower river valley, a shift of one mile in thirty years is taken as an average. Regulation of the flow at Denison would probably affect the within-bank stage down to Fulton, Arkansas. Because of the inflow below Denison, the reservoir will only reduce bank caving by 30 per cent.

285 miles from Denison to Fulton.

$285 \times 640 \div 30 = 6,080$ acres average annual bank caving.

Reduction, $6,080 \times 30\% = 1,824$ acres at \$30 = \$54,720.

18. *Telephone and power lines.*—The Telephone, telegraph, and power lines within the valley would receive considerable damage on account of poles and wire being broken down.

500 miles at \$100, including exchanges and distributions in towns	\$ 50,000
Loss of business	150,000
	<hr/>
Total	\$200,000
Annual	4,000

19. *Revetments, dikes, and retards.*—Channel stabilization for the protection of the bridges at Arthur City, Index, and Fulton would be damaged or destroyed. The damage is estimated at \$40,000; annual, \$800.

20. *Avulsions.*—The survey made by the U. S. Boundary Commission in compliance with orders issued by the U. S. Supreme Court in 1925, showed all cut-offs created by avulsions between Denison, Texas, and the Oklahoma-Arkansas state line between the years of 1844 and 1921. Using this record for a basis and extending the area to Index, Arkansas, damage was estimated at:

2,500 acres at \$15	\$37,500
Annual	750

21. *Malarial control.*—During the last few years the United States Government, cooperating with the various states and counties, has expended millions of dollars draining water holes, swamps, etc., in order to eradicate the mosquito for the purpose of controlling malaria fever. This work consists principally of digging ditches, which are silted full and consequently lost whenever a flood occurs.

20 miles ditch at \$750 per mile x 22 counties	\$330,000
Annual benefits	6,600

Authorities on the subject claim that better than 90% of the entire population living in the Red River Valley are infected with malaria. Aside from the pain, discomfort, and reduction in efficiency, a real monetary loss results from doctors' bills and the cost of medicine. It is estimated

that 9,000 persons should be annually relieved from the above expense at the rate of \$3.00 per capita.

22. *Enhanced property values.*—With the reservoir in operation a large amount of wooded land would be cleared and placed in cultivation. It is estimated that 30% of the timber land in the valley above Index, Arkansas, would be cleared almost immediately and thereby create an enhancement in the value of \$25 per acre.

136,000 x 30% x \$25 -----	\$1,020,000
Annual at 5% -----	51,000

It is also estimated that approximately 40,000 acres of marginal cleared land would be made more productive with an enhancement in value of \$25 per acre.

40,000 x \$25 -----	\$1,000,000
Annual at 5% -----	50,000

23. *Ferries.*—All ferries on Red River between Denison and Fulton would be washed out or damaged materially.

10 ferries at average loss of \$300 each -----	\$3,000
Annual -----	60

24. *Fences.*—Drift and washouts would destroy or damage a considerable amount of fence.

1,000 miles at \$50 per mile -----	\$50,000
Annual -----	1,000

25. *Intangible items.*—(a) Boll weevil. This insect hibernates in old cotton stalks, brush, and other refuse and prospers in wet places. Statistics indicate that the cotton crop suffers the most from boll weevil after a flood.

(b) Johnson Grass: After the farmers have expended thousands of dollars over a period of years to eliminate this nuisance, a flood will occur and deposit additional seed, making it necessary to start all over again.

(c) Nut Grass: When the seed of this grass has been deposited on a farm by an overflow, the land is virtually ruined, as it is practically impossible to kill it.

(d) Loss to General Business: The merchants in the small towns lying adjacent to the valley, as well as those in the cities, anticipated a large volume of business from the farmer. This business is materially reduced after a major flood.

(e) Diseases: After every disaster from floods the prevention of disease develops into a major problem. The bodies of dead animals, the pollution of wells, and the accumulation of filth all have a tendency to aggravate this condition.

(f) Regulated Flow: After the construction of the Denison Dam a regular flow will be maintained in the entire river. This regulation will eliminate the drying up of the stream bed at certain periods of the year; it will furnish permanent watering places for cattle throughout the valley, will supply sufficient water for irrigation purposes during drought years, and will reduce the pollution of the stream at the various sewerage disposal outlets.

(g) Benefits from Tourist: With the construction of the Denison Reservoir, various recreational facilities will be established bordering on and in the vicinity of the lake. Because of the comparatively short and mild winters, the climatic conditions are excellent. This condition will, naturally, have a tendency to induce tourists from every section of the country as well as thousands of people from nearby communities in both Texas and Oklahoma.

(h) Confidence of People: Under existing conditions in the valley, people with capital are unwilling to invest their money in developing or improving the land because of the uncertainty and frequency of the floods. Merchants are unwilling to furnish the farmer with more than a pit-

tance for the same reason. As a result of this condition, the development of the entire valley is retarded.

(i) Pipe Line Crossings: As the Red River flows through an oil and gas region, particularly in the Louisiana area, there are innumerable pipe lines crossing the river. The Project flood would undoubtedly destroy or damage all of these lines.

It is estimated that the total annual benefits for intangible items will amount to \$150,000.

The annual flood damages are summarized in Table No. 2, and the locations of areas protected are shown on Plate No. 1 of the main report.

Table No. 2.—Flood damages—Summary.

Item	Annual Damage
Cotton -----	\$701,417
Cottonseed -----	107,911
Other crops -----	167,393
Uncultivated land -----	30,814
1. Crops and uncultivated lands -----	\$1,007,535
2. Business buildings (buildings and merchandise) -----	\$ 24,000
3. Residence buildings (building and contents) -----	80,000
4. Factories and municipal plants -----	20,000
5. Streets -----	9,000
6. Sewers -----	3,000
7. Highways -----	17,400
8. Bridges -----	47,660
9. Railroads -----	65,000
10. Farm machinery -----	1,000
11. Livestock -----	12,590
12. Relief (Care of destitute) -----	12,000
13. Ginning losses -----	48,188

14.	Loss to railroad companies (hauling cotton)	55,149
15.	Loss to railroad companies (rerouting trains)	18,428
16.	Bank caving	54,720
17.	Telephone and power lines	4,000
18.	Revetments, dikes, and retard	800
19.	Avulsions	750
20.	Malarial control	33,600
21.	Enhanced property values	101,000
22.	Ferries	60
23.	Fences	1,000
	Subtotal	\$1,616,880
24.	Intangible items	150,000
	Grand total	\$1,766,880

APPENDIX THREE

Pertinent Provisions Oklahoma Statute for Conservation of Water Resources.

Article 5, Chapter 70, *Oklahoma Statutes* 1931, as amended by Article 3, Chapter 70, *Oklahoma Session Laws* 1935, and Article 17, Chapter 24, *Oklahoma Session Laws* 1937.

The Oklahoma Planning and Resources Board is the successor of the Conservation Commission of Oklahoma and the State Engineer of said State. Sections 2 and 3, Article 17, Chapter 24, *Oklahoma Session Laws* 1937, page 74.

Section 2 of Article 3, Chapter 70, *Oklahoma Session Laws* 1935, reads as follows:

“That the retention of rainfall and the capture and detention and distribution of flowing surface and subterranean water, and conservation of water, soil and promotion of moisture, in the State of Oklahoma, in any lawful, available and economical way and manner is hereby recognized and declared to be and is a public necessity for the preservation of the habitability, productivity, health, comfort, sanitation, convenience and public utility of the State of Oklahoma and the people thereof.”

Section 6 of Article 3, Chapter 70, *Oklahoma Session Laws* 1935, provides in part as follows:

“The said Conservation Commission shall have and is hereby authorized to exercise the following additional powers, rights, privileges and functions, to those now possessed:

“(a) To control, store and preserve within the boundaries of the State, all waters in the State which may be stored within the State in any manner whatsoever, for any useful purpose, under the authority and control of said Commission, and to use, dispose

and sell the stored water within the boundaries of the State, except as to such waters duly appropriated to private, municipal or public use;

"(b) To control rivers, creeks, ponds and lakes, to prevent or aid in the prevention of, damage to person or property from such harmful waters within the State of Oklahoma; the Conservation Commission is authorized to adopt and apply the necessary methods and means to purify and render sanitary all waters impounded by or under its authority and also to prevent the contamination or pollution of any and all reservoirs, ponds, lakes, creeks, and rivers and to call upon the Attorney General to bring any suit or action by the Commission deemed necessary to effect this object; * * *"

Also see Section 7, Article 17, Chapter 24, *Oklahoma Session Laws 1937*, page 75.

Section 13243, *Oklahoma Statutes 1931*, referring to the powers of the Conservation Commission of the State of Oklahoma now exercised by the Oklahoma Planning and Resources Board, provides in part as follows:

"The said commission is hereby vested with the duties and powers necessary and proper to enable the commission to fully and carefully carry out the object of this Act and to promote the control of floods in the State and diminish their destruction and promote the conservation and use of water in the State to the protection of public and private property and to the development of agricultural and industrial development of the State and in addition thereto, shall have the following specific powers and duties:

* * * *

"(3) Investigate and determine upon the best methods of flood control and water conservation and use in the different sections of the State for the Agricultural and Industrial development of the State and as to the best method of construction and main-

tenance of necessary structures in the State to accomplish that purpose.

"(4) Aid at all times counties, cities and municipal corporations in the State in promoting and developing flood control and water conservation in the State.

"(5) The said Commission shall have authority to negotiate contracts with the Federal Government or any department or bureau thereof, or with any State in this Union for the purpose of obtaining assistance and cooperation in the accomplishment of the purpose of flood control and water conservancy and use in the State, and to that end may match funds with such government or other state upon such terms as shall be agreed upon and approved by the Governor of the State; with the limitation, that contracts with other states for the division and apportionment of the cost and use of the water controlled by interstate projects shall be submitted to and approved by the Legislature of the State and the Governor of the State, and Congress and the President of the United States conformable to the State and Federal Constitutions.

• • •

"(7). To supervise, conserve and develop the water power of the State of Oklahoma, granting permission for the development of such power, making such reasonable rules and regulations governing the development and operation and distribution of such power except as may be otherwise provided by law, and to take such steps as may be necessary to encourage the development of water power within said State, and to undertake by, and on behalf of the State the development of water power when private development may be inadequate or unsatisfactory on such terms as may be hereinafter provided by the Legislature, and to exercise such further pow-

ers and duties as may be directed hereafter by the Legislature of this State."

The first paragraph of Section 13273, *Oklahoma Statutes* 1931, referring to hydroelectric plants, provides:

"The right of the State in its natural resources is hereby declared to be paramount to their rights and after any plant shall have been constructed by a private enterprise the State may, by legislative enactment, revoke the license and take over and operate for, and on behalf of the State, such project or projects, but no such action shall be taken by the Legislature except on intervals of ten (10) years after the completion of any such project, and the owners of said project shall be reimbursed for their original investment, plus eight (8%) per cent. annum, on their investment less its net earnings."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 832.

STATE OF OKLAHOMA EX REL. LEON C. PHILLIPS, GOVERNOR OF
THE STATE OF OKLAHOMA, *Appellant*,

v.

GUY F. ATKINSON COMPANY, a Corporation Under the Laws
of the State of Nevada, CLEON A. SUMMERS, United
States District Attorney for the Eastern District of
Oklahoma, and CURTIS P. HARRIS, Special Attorney,
Department of Justice of the United States, *Appellees*.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF OKLAHOMA.

REPLY BRIEF FOR APPELLANT.

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INDEX

	Page
I. General Statements in Reply.....	1
Prior Litigation	1
II. The Denison Reservoir Project Cannot Be Sustained as a Valid Exercise of the Commerce Power of Congress (Pages 31-44, Brief for Appellees.)	5
III. Project Cannot Be Sustained as a Proper Exercise of the Power of Congress to Provide for the General Welfare (Pages 44-60, Brief for Appellees.)	9
Conclusion	11

CASES CITED

Borden's Farm Products Company v. Baldwin, 293 U. S. 194, 213	3
Hammond v. Schappi Bus Lines, 275 U. S. 164, 170-172	4
Lindsley v. Natural Carbonic Gas Company, 220 U. S. 61, 78-80	4
Linder v. U. S., 268 U. S. 5, 17	8
Mayo v. Lakeland, Highlands Canning Company, 309 U. S. 310, 318	4
Oklahoma v. Woodring, 309 U. S. 623	1
United States v. Butler, 297 U. S. 1, 78	11

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GUY F. ATKINSON COMPANY, CLEON A. SUMMERS, UNITED
STATES ATTORNEY FOR THE EASTERN DISTRICT OF OKLA-
HOMA, ET AL., *Appellees*.

REPLY BRIEF FOR APPELLANT.

The Appellant and Appellees are, as shown by the briefs, far apart in their contentions as to the factual bases around which the constitutional questions must be resolved.

I.

General Statements in Reply

Prior Litigation.

Counsel for Appellees refer in their brief to the case of *Oklahoma v. Woodring*, 309 U. S. 623, wherein Appellant filed with this Court a motion for leave to file a Bill of Complaint asking for an injunction against Harry H.

Woodring, then Secretary of War. The statement is made that the complaint in the case at bar, except for the parties, "is substantially identical with the complaint in the *Woodring* case."

In this, counsel have fallen into a serious error.

The allegations of fact contained in paragraph 6 of the complaint (pages 6, 7, and 8 R.), to which we will presently refer, were referred to only incidentally in the complaint which the Appellant sought to file in the *Woodring* case. While counsel in the *Woodring* case, both for movant and respondent, dwelt at some length on certain facts, the then offered complaint did not contain the positive allegations to which we will presently refer*.

Paragraph 6 of the presently challenged complaint (pages 6, 7, and 8 of R.), after setting forth the statutory scheme for the dam and the reservoir, says:

"That as set forth in the statutory scheme or authorization act for said project, the first 110 feet in height of the dam [*i. e.*, the dead storage] is to be used solely and exclusively for the development of water power, and the superimposed 40 feet set forth in said statutory scheme is to be used solely and exclusively for the impounding and discharge of flood waters; that the statutory purposes for said project are not related to each other except by the fortuitous circumstance of being at the same location and being purportedly authorized by the same Act.

"That as set forth in the statutory scheme or authorization Act, the two purposes for which said reservoir and dam are authorized are functionally separate and neither is the incidental or necessary result of the other; that the water power feature of said project is not in aid of or related to the flood control feature thereof.

*Furthermore, since the submission of the *Woodring* case, an extensive oil field has been developed in the proposed basin, thereby greatly increasing the injuries which Appellant would suffer (page 4, R.).

except as hereinabove set forth; that the flood control reservoir as projected in said scheme cannot and will not affect the power feature thereof; that the flood control portion of said reservoir can only be used for the impounding and release of flood waters of Red River and Washita River. As set forth in the statutory scheme, the power reservoir will normally be kept full of water. It is no part of said statutory scheme or authorization Act, nor is it physically possible that the same part of the reservoir be used for both flood control and water power purposes; that as set forth in the statutory scheme or authorization Act, the waterpower portion of said reservoir is purposefully and separately created at the expense of the utilization for flood control of that part of the reservoir to be used for water-power."

In the brief of Appellees, these plain and positive allegations of fact are sought to be destroyed by mere assumptions. We will presently refer to the fallacy of these assumptions, but at this point we must emphasize that the only question here is whether the complaint states a cause of action.

It is well established that a mere general allegation that a legislative act is repugnant to the constitution is not enough. But it is likewise true that, "it is inexpedient to determine grave constitutional questions upon a demurrer to the complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."* *Borden's Farm Products Company v. Baldwin*, 293 U. S. 194, 213. This same case holds that the Court should read the complaint, "in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision * * * should not turn on other facts which are the proper subjects of evidence and of determination of fact by the trial court" (page 209).

*Unless stated to the contrary, emphasis herein is supplied.

In the case of *Hammond v. Schappi Bus Lines*, 275 U. S. 164, 170-172, this Court used the following apposite language on this point and said:

"Before any of the questions suggested, which are both novel and of far reaching importance are passed upon by this Court, the facts essential to their decision should be definitely found by the lower court upon adequate evidence."

See also *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 61, 78-80; *Mayo v. Lakeland, Highlands Canning Company*, 309 U. S. 310, 318.

The court below seems to have fallen into the same error as have counsel for Appellees, and disregarded the plain and positive allegations of fact set forth in the complaint as is illustrated in this language from the memorandum opinion from the court below:

"While it may be true that the generation of electricity is not incidental to flood control, it manifestly is true that when the Government impounds water behind a dam for purposes of flood control, there is a vast amount of stored energy which may reasonably be converted into electrical energy."

The complaint alleges squarely to the contrary, viz.; that a dam constructed for flood control would create no amount of raw water power, much less "a vast amount." The complaint also negatives the assumption of counsel for Appellees that the power of falling water is a mere incident of the construction of a flood control dam.

Appellees' statements pages 13, 14, and 15 of their brief, that the dead storage part of the Denison Reservoir is for the "accumulation of silt" and that the allegations in Appellant's complaint; that the dead storage-part of the reservoir is solely for the development of water power, are misleading and incorrect, constitute only another effort to overcome by assumptions a positive allegation of fact.

Indeed, this serves to emphasize how important it is that, when this Court comes to pass upon the important constitu-

tional questions here involved, it shall do so only on the basis of complete facts, determined by orderly processes in the trial court.

The definite allegation is made in the complaint that "dead storage is to be constructed solely in order to give a head for water power." (Page 6 R.).

This is precisely what the statutory scheme provides (H. D. 541, page 6).

On page 41 (H. D. 541), the District Engineer says:

"*** the remainder of 1,400,000 acre feet would be dead storage used primarily for creation of head."

"Dead storage" cannot be of the slightest benefit for flood control or "improving navigation" or "regulating the flow of Red River" as we have pointed out in our original brief (pages 45, 46). The flood control reservoir would require no dead storage at all. In fact dead storage can afford no flood control whatsoever and the complaint so alleges. The flood control reservoir would come into temporary use only during flood times and then for the temporary impounding and releasing of flood waters.

What we have just said is in answer to the contention of Appellees to the effect that the court below, or this Court, should, in view of the grave constitutional questions presented, adjudge the complaint insufficient upon its face without hearing the evidence.

II.

The Denison Reservoir Project Cannot Be Sustained as a Valid Exercise of the Commerce Power of Congress. (Pages 31-44, Brief for Appellees.)

As pointed out in our orginal brief (pages 41-44 and pages 50-53), this project has no substantial relation to the improvement of navigation or to interstate commerce.

The amendment to the complaint (p. 18, R.) specifically alleges:

"That the sole and only purposes of said project are those set forth in the Authorization Act and described

in the statutory scheme aforesaid for flood control and hydroelectric power, neither of which has any real or substantial relation to the improvement of navigation of the navigable portions of Red river or of the Mississippi river; such inconsequential and intangible benefits to navigation as may result from said project, would flow from the flood control feature thereof and not the hydroelectric feature thereof."

Appellees in their Brief use a hypothetical flood (some two and a half to three times greater than the largest known flood of record, that of 1908), set forth in Appendix H to House Document 541, as the basis of saying that the flood control feature of the Denison project would prevent serious interruption to the arteries of interstate commerce.

At p. 11 of their Brief, Appellees refer to a so-called "Definite Project," and attach as Appendix C (pp. 97-110) certain portions thereof and on April 30th Appellant received from counsel for Appellees a mimeographed copy of an undated report purportedly made by the District Engineer, which on its face has not been approved by *any* higher authority, let alone by the Chief of Engineers and the Secretary of War, and which obviously has no status as a public document. The resort by Appellees to such an expedient serves only to emphasize the vice of seeking to persuade this Court to decide these important constitutional issues without the benefit of an orderly determination of the *factual* issues.

Counsel for Appellant have not had opportunity to digest the contents of that report, either by themselves or with the benefit of technical advice. However, mere scanning of the report has revealed some pertinent things.

For instance, in the "Definite Project" all means to provide flood control protection for the above-mentioned and so-called *hypothetical* flood (per Appendix H, H. D. 541) is abandoned. The "Definite Project" provides (bottom of page 100, Appellees' Brief):

"Accordingly, storage to control floods equal in magnitude to the 1908 flood, the largest on record, is all that can be economically justified."

It would thus seem clear that, in so far as the separate flood control feature of the project is concerned, the same is now limited to economic advantages to agriculture in the valley below the dam, since it is clearly shown by the statutory scheme that:

"In general, there are but few of the works of man such as cities, villages, highway or railway bridges, or even farm buildings in the ordinary flood plain of the river" (page 29)*

While it is true, as set forth in our original brief, that floods of the intensity of the one in 1908 do cause serious agricultural damage, there is no basis in the findings of the engineers that arteries of the interstate commerce are seriously interrupted.

In saying the above we make no argument against the plenary power of Congress to regulate interstate commerce, but we do earnestly contend that in so far as interstate commerce or navigation is concerned the project has no substantial or tangible relation thereto. In fact, as our scanning has disclosed, even the report on the "Definite Project" specifically provides (page 3, Volume I):

"4. Purpose of Project.—The project is for the *control of floods* in the Red River Valley below Denison, Texas, and for the *production of hydroelectric power.*"

On page 26 the statement is made:

"74. Reservoir Operation.—The operation of the Denison project involves consideration of its two-fold purposes; i. e., *flood control and power.*"

*As pointed out in our brief (page 42), the flood control feature would protect only agricultural land east or below the dam and only to the extent of floods which arise on Red River west or above the dam. Appellees' Brief (page 41) refers to the washing out of a toll bridge in Wichita County, Texas, and another bridge in Burk Burnett, Texas. These locations are far to the west and above the dam and could not possibly be benefitted by it. The flood at Shreveport, Louisiana, referred to on page 14 of Appellees' Brief, was caused by the flood waters which originated on tributaries of Red River east or below the dam. All the above adds emphasis to our contention that the final decision in this case should be based on findings of fact by the trial court.

There appears to be no claim of benefit to navigation or interstate commerce.

The statement on page 36 of Appellees' Brief, to the effect that it is an engineering fact that part of the project "necessary for flood control is also available for power," is directly contradicted by the positive allegations of the complaint and the factual data supplied by the statutory scheme (p. 30, 31, 35-39 Appellant's Original Brief).*

Following the argument of Appellees to its logical conclusion, the interstate commerce power would be swelled to a point where it would absorb all the powers of Appellant, destroy our Federal Constitutional system and result in a completely centralized Government.

Even assuming that the flood control feature could be said to rest upon constitutional power, it could not be logically contended that Congress, having such power, might in addition construct a waterpower project having no functional or rational relation to the flood control feature. If Congress under the facts alleged in the complaint, may construct the waterpower feature of the Denison project, it could logically go further and construct facilities for the processing of agricultural products, such as cotton gins, milling companies, feed mills, etc.

The challenged complaint by its allegations brings the authorization of the Denison project under the condemnation of the constitutional principle that the attainment of a prohibited end may not be accomplished under the pretext of exercising granted powers (*Linder v. U. S.*, 268 U. S. 5, 17, and authorities cited on page 60 of Appellant's Original Brief).

We close this division of our reply argument by emphasizing the statement of Counsel for Appellees on page 20 of their brief that,

*On page 2, Appendix F, Volume I, "Definite Project," the statement is made: "The elevation of the top power pool is based on the energy generation and the capacity of the power plant required to meet the market demand reported by the Federal Power Commission." In short, the power project and purpose predominate.

"Judicial review is we believe limited to determining whether or not the legislation is *in fact* a regulation of interstate commerce"

The above statement is precisely what we contend for in this case. We were denied a hearing in the court below on the question that the legislation with respect to the Denison project bears no direct relation to the regulation of interstate commerce.

III.

Project Cannot Be Sustained as a Proper Exercise of the Power of Congress to Provide for the General Welfare.

(Pages 44-60, Brief for Appellees.)

In our original brief (pages 54-55), we have cited the applicable authorities construing the general welfare cause. Appellees have devoted much space in their brief to the long continued policy of Congress to make appropriations of money under the general welfare cause. It is asserted that flood control is a national problem and that flood disasters have long been the cause of study by Congress as well as the Army Engineers.

We believe that the beneficent purposes of Congress with respect to flood control and other national problems have but little, if any, relevancy to the questions before the Court on this appeal. We do not have here any question involving the authority of Congress to levy taxes or spend money for the promotion of the general welfare. It is our position that the power to spend for the general welfare is not a substantive grant of authority to the Federal Government outside the compass of granted or implied powers to undertake directly, much less to engage in undertakings not related to any of its constitutional powers, merely because they involve the expenditure of money.

Counsel for Appellees contend, in substance, that Congress having the power to authorize a flood control project may add thereto an entirely separate and unrelated one for the development of water power as a means of making the

project economically feasible. This is the theory upon which the engineers projected the statutory scheme and is the theory upon which Congress authorized the project.

It is our belief that this Court need not reach the question of the constitutional authority of the Government to authorize a flood control project. Assuming arguendo that the Government does have such power, the question here is whether it may separately and purposefully construct a power project merely because it is constructing a flood control project at the Denison site. What we here assert is not that the Government is spending money, but that Appellees are condemning lands within Appellant's domain for a reservoir site and the contractor having control over a large number of people with a large number of machines is engaged in erecting a physical structure, which when completed, will embrace two entirely unrelated projects resulting in the forcible destruction of a large acreage of Appellant's domain including its own fast lands and that of its citizens with the attending consequences set forth in the complaint.

We assert that Congress has no authority under the general welfare or any other power to authorize Appellees to commit the physical acts for the accomplishment of the purposes set forth in the complaint.

Appellees assert that Congress having the power to levy taxes and spend money must also have the necessary and proper means by which it can spend, including the power of eminent domain and the power to take and destroy Appellant's quasi sovereign, proprietary and boundary rights. Following that argument to its logical end, it is asserted that Congress having the power to spend money may go further and authorize any project provided the same relates to the national welfare, and "that this welfare is general, not particular" (pages 55, 56; Appellees' Brief).

It is also asserted, in substance, that the exercise of the Federal welfare power is, of all the powers of Congress, least adapted to judicial inquiry. Probably proceeding on this theory, counsel argue that the Denison project would

afford "relief for the unemployed," provide a "considerable stimulus" to the industrial development of the area; make possible the enlarged cultivation of the wooded sections of the south area in the basin;* benefit the control of malaria; afford recreational facilities, etc.

It would serve no useful purpose to attempt any extended reply to this line of argument. In the first place, it is irrelevant to the issues of fact presented by the complaint. In the next place this Court is definitely committed to the doctrine that the general welfare clause may not be used by Congress, "to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restriction save such as are self-imposed." *United States v. Butler*, 297 U. S. 1, 78, and the authorities cited on page 44 of Appellant's Original Brief.

CONCLUSION.

I. The complaint alleges that the statutory scheme involved purports to authorize two entirely separate and distinct projects at the same site, viz, a power project and a flood control project.

(a) The power project occupies the entire site up to elevation 620 feet (617 feet as the plans have been modified), and precludes the use of any part of the site up to that elevation for flood control purposes.

(b) The flood control project is superimposed upon the power project, and occupies that part of the site above elevation 620 feet in the statutory scheme (above elevation 617 feet as the plans have been modified). See General Schley's statement page 24 of the original brief.

(c) We have here a dual or multiple purpose *statutory scheme* for two separate and entirely unrelated purposes. The situation is precisely the same as would exist if Congress had initially authorized the construction solely of a power project occupying the site up to elevation 620 feet in

*Directly in conflict with the Government's policy for the prevention of surplus crops.

a statute dealing with no other project or subject matter. Congress, at a later date, might by a second and independent act have authorized the construction of a flood control reservoir superimposed upon the power project. Plainly, the validity or the constitutional authority to construct each of these projects would have to be separately determined and that necessity cannot be escaped by authorizing both projects concurrently in a single statutory scheme.

II. The questions presented then are:

- (a) Has the Federal Government constitutional authority to authorize the separate power project?
- (b) If we assume the Federal Government has constitutional authority to authorize the separate flood control project, the two projects are so inseparable as to render the whole scheme invalid*
- (c) Even if the authorization for the Denison project were severable, Appellant would be entitled to enjoin the unconstitutional construction of the separate power project, and entitled to the great relief which would be offered it to that extent. (See pp. 44-46 Appellant's original Brief.) On the basis of a flood control project in the Statutory Scheme requiring 5,900,000 acre feet, the land required for a flood control project alone would be 25 per cent less. Under the modified plans the acre feet required for flood control is reduced to 2,745,000 acre feet (see p. 33, original Brief), which would save Appellant the loss of 3,080,000 acre feet required for power (dead storage 1,020,000 acre feet. Power pool, 2,060,000 acre feet).

*It is plain that the two projects are inseparable because Congress would not have authorized the flood control project except for the profits anticipated from the power project and because under the statutory scheme it would be physically impossible to construct the flood control project without the prior construction of the power project since the flood control feature is superimposed on the power reservoir.

III. While the court need not reach the question of the constitutional power of Congress to construct the flood control project under the circumstances in this case, the lack of constitutional authority to construct the separate power project is inescapable under the settled decisions of this court.

(a) There is a marked distinction between the creation of raw water power and its conversion into electrical energy. The raw water power must first be constitutionally created and it may be so created only where it comes into being as the incidental and necessary result of the operation and construction of a constitutional structure.

In this case the raw water power is not constitutionally created, but is separately and purposefully created by the unconstitutional construction of an entirely independent project occupying the site up to elevation 620 feet, or 617 feet as the plans have been modified.

The decisions of this court uphold the right of the Government to convert constitutionally created waterpower into electricity. We have no such facts in the case at bar, for here the raw waterpower is not incidentally created and has no relation to the flood control project.

(b) The raw waterpower and the power project are here separately and purposefully created, not as an incident of the construction of the flood control project, but at the expense of the utilization of the site for a flood control project.

(c) There is no conceivable relation between the water-power feature of the project and navigation or flood control. On the other hand, the relation of dead and power storage to the production of power is direct and practically total.

IV. We are not here dealing with motive; but with purposes of Congress. Motive is the thing which moves Congress to act, but a purpose is the objective sought to be achieved.

The purpose of Congress to construct a separate and independent power project is inescapable and that purpose, or objective, is in excess of constitutional authority. The inescapable nature of the statutory scheme cannot be obscured by any congressional declarations. (See authorities, page 60 Appellant's Brief)

The Congressional declaration with respect to the Denison Reservoir of "other beneficial uses" is shown by the complaint to comprehend the purpose to construct a separate power project.

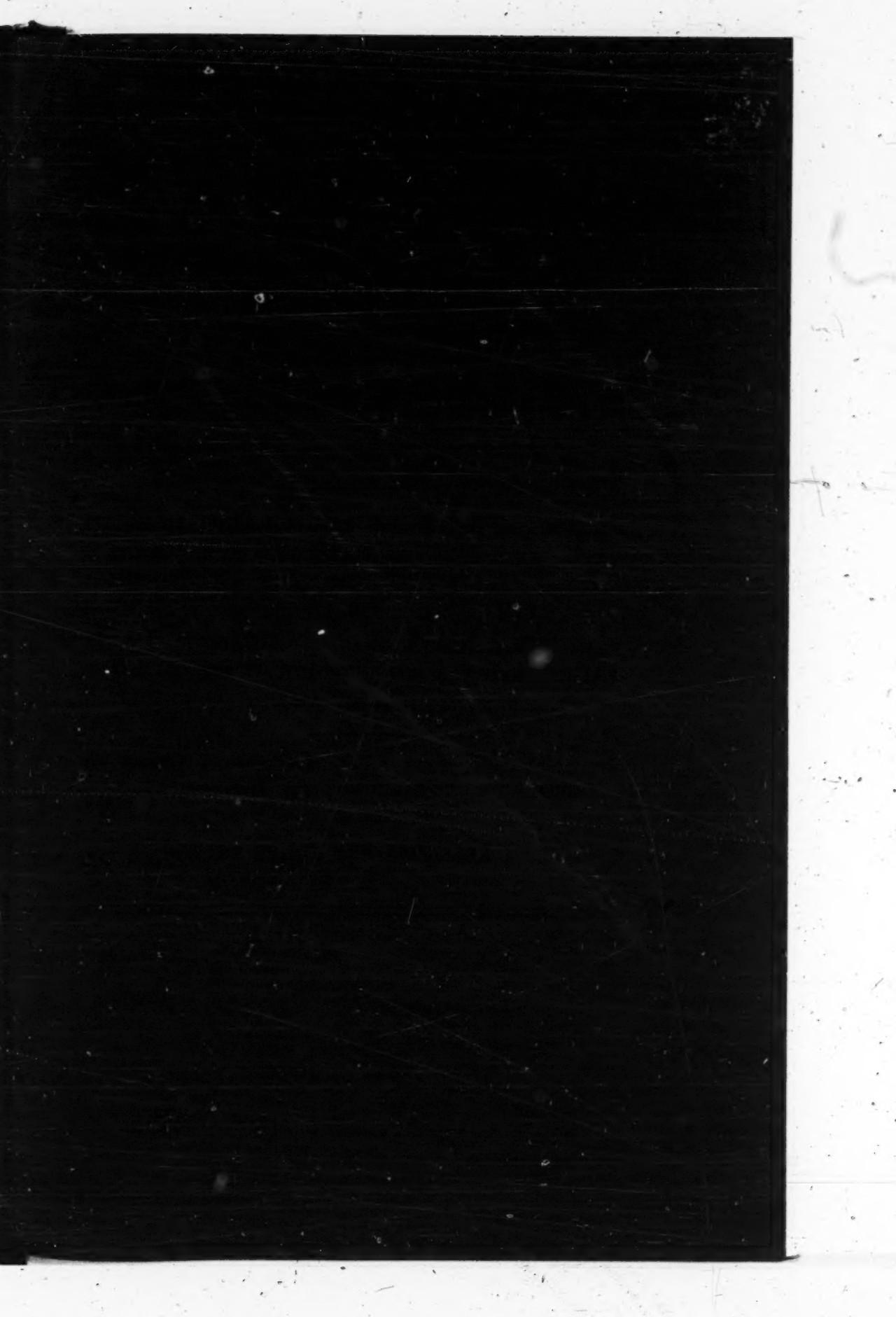
V. While this project is referred to in the statutory scheme and in the briefs as one for dual or multiple purposes, it must be remembered that, as shown by the complaint as well as the engineer's report, *the only duality of purpose is in the statutory scheme.* The complaint shows that the two purposes are entirely separate and the power feature is not the incidental result of the construction and operation of the flood control feature.

Respectfully submitted,

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement:	
1. Prior litigation.....	2
2. Statutory authorization for the Denison Project.....	3
3. The Denison Dam and Reservoir.....	9
4. The present suit.....	15
Summary of Argument.....	18
Argument:	
I. The jurisdiction of the District Court.....	24
A. The suit may be one against the United States.....	24
B. The Secretary of War may be an indispensable party.....	26
C. Equity jurisdiction is doubtful but not challenged.....	27
II. The Denison Dam and Reservoir project is a valid exercise of the commerce power of Congress.....	31
A. The issue posited by the complaint.....	32
B. The Denison project will aid in the improvement of navigation and in the control of flood waters.....	34
C. The Denison project will prevent the interruption of interstate commerce by floods.....	39
III. The Act of June 28, 1938, is a proper exercise of the power of Congress to provide for the general welfare.	44
A. Flood control in general is an exercise of the power to provide for the general welfare.....	49
B. The Denison Project provides for the general welfare.....	56
C. The welfare clause authorizes acquisition and construction as well as expenditure.....	60
IV. The Tenth Amendment is not violated.....	69
Conclusion.....	72
Appendix A.....	75
Appendix B.....	80
Appendix C.....	97

(1)

CITATIONS

Cases:	Page
<i>Allen v. Baltimore & Ohio Railroad Company</i> , 114 U. S.	
311.....	25
<i>Appalachian Electric Power Co. v. Smith</i> , 4 F. Supp. 6.....	36
<i>Arizona v. California</i> , 283 U. S. 423.. 20, 22, 33, 37, 38, 39, 43, 52	
<i>Arizona v. California</i> , 298 U. S. 558.....	29, 72
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U. S. 288.....	20,
22, 33, 37, 38, 43, 45	
<i>Ayers, In re</i> , 123 U. S. 443.....	26
<i>Bastian v. United States</i> , C. C. A. 6th, No. 8433, decided April 8, 1941.....	62, 68
<i>Brooks v. Dewar</i> , No. 718, Present Term.....	18, 24, 27, 31
<i>California v. Latimer</i> , 305 U. S. 255.....	30
<i>California v. Pacific Railroad Co.</i> , 127 U. S. 1.....	43
<i>California Oregon Power Co. v. Cement Co.</i> , 295 U. S. 142. 22, 36	
<i>Carter v. Carter Coal Co.</i> , 298 U. S. 238.....	61
<i>Cavanaugh v. Looney</i> , 248 U. S. 453.....	28
<i>Chappell v. United States</i> , 160 U. S. 499.....	63
<i>Cherokee Nation v. Southern Kansas Railway Co.</i> , 135 U. S.	
641.....	63, 66, 70
<i>Cincinnati Soap Co. v. United States</i> , 301 U. S. 308.....	52
<i>Colorado v. Toll</i> , 268 U. S. 228.....	25, 30
<i>Economy Light Co. v. United States</i> , 256 U. S. 113.....	35
<i>Florida v. Mellon</i> , 273 U. S. 12.....	30, 71
<i>Franklin Tp. in Somerset County, N. J. v. Tugwell</i> , 85 F. (2d) 208.....	30, 62
<i>Georgia v. Stanton</i> , 6 Wall. 50.....	28
<i>Georgia v. Tennessee Copper Co.</i> , 206 U. S. 230.....	28
<i>Gilman v. Philadelphia</i> , 3 Wall. 713.....	43
<i>Greenwood County v. Duke Power Co.</i> , 81 F. (2d) 986.....	60
<i>Hagood v. Southern</i> , 117 U. S. 52.....	26
<i>Helsing v. Davis</i> , 301 U. S. 619..... 19, 22, 30, 45, 46, 49, 54, 56	
<i>Houston & Texas Ry. v. United States</i> , 234 U. S. 342.....	36
<i>Hurley v. Kincaid</i> , 285 U. S. 95.....	28
<i>Indiana v. United States</i> , 148 U. S. 148.....	44
<i>Inland Waterways Corp. v. Young</i> , 309 U. S. 517.....	31
<i>Juillard v. Greenman</i> , 110 U. S. 421.....	45
<i>Kansas v. Colorado</i> , 206 U. S. 46.....	28
<i>Kohl v. United States</i> , 91 U. S. 367.....	60, 64, 65
<i>Labor Board v. Jones and Laughlin</i> , 301 U. S. 1.....	43
<i>Legal Tender Cases</i> , 12 Wall. 457.....	45
<i>Luxton v. North River Bridge Co.</i> , 153 U. S. 525.....	44, 63, 66
<i>Massachusetts v. Mellon</i> , 262 U. S. 447.....	27
<i>Missouri v. Holland</i> , 252 U. S. 416.....	30
<i>Monongahela Bridge v. United States</i> , 216 U. S. 177.....	70
<i>Nebraska v. Wyoming</i> , No. 8, Original, this Term.....	29
<i>New Jersey v. Sargent</i> , 269 U. S. 328.....	27, 72
<i>New York v. Illinois</i> , 274 U. S. 488.....	27

Cases—Continued.

	Page
<i>Norman v. B. & O. R. Co.</i> , 294 U. S. 240.....	45
<i>Oklahoma v. Cook</i> , 304 U. S. 387.....	28
<i>Oklahoma v. Texas</i> , 258 U. S. 574.....	20, 34
<i>Oklahoma v. Texas</i> , 260 U. S. 606.....	9
<i>Oklahoma v. Woodring</i> , 309 U. S. 623.....	3
<i>Oklahoma City v. Sanders</i> , 94 F. (2d) 323.....	68
<i>Opp Cotton Mills, Inc. v. Wage and Hour Div., Dept. Labor</i> , No. 330, this Term, decided Feb. 3, 1941.....	69
<i>Pacific Railroad Removal Cases</i> , 115 U. S. 1.....	44
<i>Pensacola Tel. Co. v. Western etc. Tel. Co.</i> , 96 U. S. 1.....	44
<i>Perkins v. Lubens Steel Co.</i> , 310 U. S. 113.....	31
<i>Philadelphia Co. v. Stimson</i> , 223 U. S. 605.....	25
<i>Roe v. Kansas</i> , 278 U. S. 191.....	67
<i>Santa Cruz Co. v. Labor Board</i> , 303 U. S. 453.....	43, 44
<i>Second Employers' Liability Cases</i> , 223 U. S. 1.....	22, 43, 44
<i>Steward Machine Co. v. Davis</i> , 301 U. S. 548.....	22, 45, 51, 59, 63
<i>Stockton v. Baltimore and N. Y. R. Co.</i> , 32 Fed. 9.....	70
<i>Town of Bedford v. United States</i> , 23 F. (2d) 453.....	70
<i>Tyler, In re</i> , 149 U. S. 164.....	25
<i>United States v. Appalachian Power Co.</i> , 311 U. S. 377.....	20, 33, 37, 39, 70
<i>United States v. Butler</i> , 297 U. S. 1.....	45, 49, 61, 63
<i>United States v. Certain Lands in City of Louisville</i> , 78 F. (2d) 684, certiorari granted, 296 U. S. 567, dismissed, 297 U. S. 726.....	62
<i>United States v. Chandler-Duntar Co.</i> , 229 U. S. 58.....	37, 38
<i>United States v. Curtiss-Wright Corp.</i> , 299 U. S. 304.....	52
<i>United States v. Dieckmann</i> , 101 F. (2d) 421.....	68
<i>United States v. F. W. Darby Lumber Co., et al</i> , No. 82, this Term, decided February 3, 1941.....	24, 69
<i>United States v. Eighty Acres of Land</i> , 26 F. Supp. 315.....	36, 55, 68
<i>United States v. 540.08 Acres</i> , 22 F. Supp. 775.....	36, 68
<i>United States v. Gettysburg Electric Ry.</i> , 160 U. S. 668.....	24, 45, 63, 66, 67, 70
<i>United States v. Griffin</i> , 58 F. (2d) 674.....	36
<i>United States, In re</i> , 28 F. Supp. 758.....	55, 68
<i>United States v. Rio Grande Irrigation Co.</i> , 174 U. S. 690.....	22, 36, 72
<i>United States v. Sponenbarger</i> , No. 72, October Term, 1939.....	58
<i>United States v. Utah</i> , 283 U. S. 64.....	22, 36
<i>Virginian Ry. v. Federation</i> , 300 U. S. 515.....	43, 44
<i>Wayne County v. United States</i> , 58 C. Cls. 417, affirmed, 252 U. S. 574.....	70
<i>Wisconsin v. Illinois</i> , 278 U. S. 367, 281 U. S. 179.....	28
<i>Woodring v. Wardell</i> , 309 U. S. 527.....	31

Constitution and Statutes:	Page
United States Constitution, Art. I, Sec. 8.....	70
Act of May 8, 1812, c. 79, 2 Stat. 730.....	49
Act of February 17, 1815, c. 45, 3 Stat. 211.....	49
Act of January 24, 1827, c. 3, 6 Stat. 356.....	49
Act of June 30, 1834, c. 180, 6 Stat. 581.....	49
Act of March 19, 1836, c. 42, 5 Stat. 6.....	49
Act of May 9, 1860, c. 40, 12 Stat. 15.....	49
Act of February 16, 1863, c. 37, 12 Stat. 652.....	49
Act of April 23, 1874, c. 125, 18 Stat. 34.....	50
Act of May 13, 1874, c. 170, 18 Stat. 45.....	50
Act of June 23, 1874, c. 455, 18 Stat. 204.....	50
Act of January 25, 1875, c. 25, 18 Stat. 303.....	50
Act of February 10, 1875, c. 40, 18 Stat. 314.....	50
Act of March 3, 1877, c. 106, 19 Stat. 368, 374.....	50
Act of June 14, 1878, c. 191, 20 Stat. 115, 127.....	50
Act of April 18, 1879, c. 1, 21 Stat. 1.....	50
Act of April 11, 1882, c. 77, 22 Stat. 44.....	50
Act of March 31, 1890, c. 58, 26 Stat. 33.....	50
Act of June 4, 1897, c. 2, 30 Stat. 11.....	50
Act of December 18, 1897, c. 2, 30 Stat. 226.....	50
Act of July 1, 1898, c. 546, 30 Stat. 597.....	50
Act of May 13, 1902, c. 787, 32 Stat. 198.....	50
Act of January 5, 1909, c. 7, 35 Stat. 584.....	49
Tucker Act, 36 Stat. 1093, 28 U. S. C., Sec. 41 (20).....	28, 29
Act of October 22, 1913, c. 32, 38 Stat. 208, 211, 215, 216.....	50
Act of August 1, 1914, c. 223, 38 Stat. 609.....	49
Act of March 1, 1917, c. 144, 39 Stat. 948.....	4, 52
Act of February 25, 1919, c. 38, 40 Stat. 1161.....	50
Act of December 22, 1921, c. 15, 42 Stat. 351.....	50
Act of February 24, 1925, c. 297, 43 Stat. 963-964.....	49
Act of January 26, 1928, c. 11, 45 Stat. 53.....	50
Act of May 15, 1928, c. 569, 45 Stat. 534.....	4
Sec. 10.....	5
Act of May 16, 1928, c. 572, 45 Stat. 539.....	50, 51
Act of May 29, 1928, c. 853, 45 Stat. 853.....	51
Act of February 25, 1929, c. 318, 45 Stat. 1306.....	51
Act of February 28, 1929, c. 366, 45 Stat. 1349, 1381.....	51
Act of June 13, 1929, c. 18, 46 Stat. 8.....	50
Act of April 18, 1934, c. 121, 48 Stat. 589.....	51
Act of April 17, 1936, c. 234, 49 Stat. 1232.....	51
Act of June 22, 1936, c. 688, 49 Stat. 1570.....	5
Sec. 1.....	47, 75
Sec. 7.....	6, 7, 76
Sec. 9.....	77
Act of February 11, 1937, c. 10, 50 Stat. 10.....	51
Act of August 24, 1937, c. 754, sec. 3, 50 Stat. 751-753, 28 U. S. C. Supp. V, sec. 380a.....	17
Act of March 3, 1938, c. 40, 52 Stat. 84.....	51

Constitution and Statutes—Continued.	Page
Act of June 28, 1938, c. 795, 52 Stat. 1215.....	3, 7, 28, 48
Sec. 4.....	7, 32, 77
Sec. 9.....	79
Act of June 28, 1939, 53 Stat. 856.....	8, 13
Act of June 24, 1940, Public, No. 653; c. 415, 76th Cong., 3d Sess.....	8
Act of October 17, 1940, Public, No. 868, c. 895, 76th Cong., 3d Sess.....	8, 33, 48
Sec. 4.....	8, 79
J. Res. Nos. 6, 9, 12, 16, 22 Stat. 378, 379.....	50
J. Res. No. 16, 26 Stat. 671.....	50
J. Res. No. 14, 48 Stat. 20.....	51
J. Res. No. 251, 50 Stat. 211.....	51
Pub. Res. No. 1, 5 Stat. 131.....	49
Pub. Res. No. 69, 14 Stat. 364.....	49
Pub. Res. No. 28, 15 Stat. 28.....	49
Pub. Res. No. 16, 21 Stat. 303.....	49
Pub. Res. No. 30, 21 Stat. 306.....	50
Pub. Res. No. 9, 22 Stat. 267.....	50
Pub. Res. No. 12, 23 Stat. 268.....	50
Pub. Res. No. 18, 23 Stat. 269.....	50
Pub. Res. No. 32, 23 Stat. 273.....	50
Pub. Res. Nos. 44, 25 Stat. 630.....	50
Pub. Res. No. 48, 25 Stat. 631.....	50
Pub. Res. No. 3, 30 Stat. 216.....	50
Pub. Res. No. 9, 30 Stat. 219.....	50
Pub. Res. No. 11, 30 Stat. 220.....	50
Pub. Res. No. 12, 30 Stat. 220.....	50
Pub. Res. No. 14, 30 Stat. 221.....	50
Pub. Res. No. 16, 34 Stat. 827.....	49
Pub. Res. No. 19, 34 Stat. 828.....	49
Pub. Res. No. 20, 35 Stat. 572.....	50
Pub. Res. No. 19, 37 Stat. 633.....	50
 Miscellaneous:	
29 Bulletin of American Railway Engineering Association, No. 303, Pt. II (1928), pp. 41, 44.....	41
35 Col. L. Rev. (1935), 284-285.....	63
Com. Doc. No. 1, H. Com. on Flood Control, 75th Cong., 1st Sess. (1937).....	6, 35
83 Cong. Rec., p. 8601, 75th Cong., 3d Sess.....	29
Corwin, <i>Constitutional Aspects of Federal Housing</i> (1935) 84 U. Pa. L. Rev. 131.....	63
Elliott, <i>The Improvement of the Lower Mississippi River for Flood Control and Navigation</i> (1932), pp. 1-21.....	3
50 Harv. L. Rev. (1937), 802, 805-813.....	63
H. Doc. No. 1, 75th Cong., 1st Sess., p. 3.....	53
H. Doc. No. 90, 70th Cong., 1st Sess., pp. 11, 13.....	4, 54
H. Doc. No. 378, 74th Cong., 2d Sess.....	5, 40, 41, 42

Miscellaneous—Continued.	Page
H. Doc. No. 541, 75th Cong., 3d Sess.....	7, 9,
10, 33, 34, 35, 37, 38, 39, 40, 41, 58, 57, 58, 59	
H. Rept. No. 1072, 70th Cong., 1st Sess., pp. 18-20.....	4
H. Rept. No. 2583, 74th Cong., 2d Sess., p. 2.....	4
H. Rept. No. 604, 76th Cong., 1st Sess., p. 4.....	8
H. Rept. No. 2361, 76th Cong., 3d Sess., p. 13.....	48
Hearings, H. Comm. on Flood Control, 70th Cong., 1st Sess.....	4
Hearings, H. Comm. on Flood Control on S. 3531, 74th Cong., 2d Sess.....	5
Hearings, H. Comm. on Flood Control on H. R. 6634, 76th Cong., 1st Sess., p. 6.....	53
Hearings, H. Comm. on Flood Control on H. R. 7646, 75th Cong., 1st Sess., pp. 26-27, 30.....	53, 54
Hearings, H. Comm. on Flood Control on H. R. 10918, 75th Cong., 3d Sess., pp. 605-686.....	7, 41, 42, 56
Hearings, H. Comm. on Flood Control on H. R. 10618, 76th Cong., 3d Sess., p. 23.....	52
Hearings, H. Subcom. on Appropriations, 76th Cong., 1st Sess., pp. 383-443.....	56
Hearings on Flood Control, S. Comm. on Interstate Com- merce, 70th Cong., 1st Sess.....	4
Hearings, S. Comm. on Interstate Commerce on S. 3531, 74th Cong., 2d Sess.....	5
Hearings, S. Subcom. on Appropriations on H. R. 6260, 76th Cong., 1st Sess.....	8, 13, 56
33 Mich. L. Rev. (1935), 957-960.....	63
13 N. Y. U. L. Q. Rep. (1936), 285-287.....	63
1 Nichols, <i>Eminent Domain</i> (2d ed. 1917), p. 113.....	70
20 Boston U. L. R. 615, 637, Nichols, <i>The Meaning Of Pub- lic Use in the Law of Eminent Domain</i>	63
Nicholson, <i>Recent Decisions on the Power to Spend</i> , 12 Temple L. Q. 435, 458 (1938).....	63
S. Rept. No. 1662, 74th Cong., 2d Sess., p. 2.....	4
S. Rept. No. 1365, 76th Cong., 3d Sess., p. 71.....	48
S. Rept. No. 1876, 76th Cong., 3d Sess., p. 4.....	48
S. Rept. No. 2072, 76th Cong., 3d Sess., p. 10.....	48
11 Wis. L. Rev. (1935), 113-115.....	63

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 832

STATE OF OKLAHOMA EX REL. LEON C. PHILLIPS,
GOVERNOR OF THE STATE OF OKLAHOMA, APPEL-
LANT

v.

GUY F. ATKINSON COMPANY, CLEON A. SUMMERS,
UNITED STATES ATTORNEY FOR THE EASTERN DIS-
TRICT OF OKLAHOMA, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the district court (R. 22-31) is reported at 37 F. Supp. 93.

JURISDICTION

The court below, three judges sitting, entered a judgment dismissing the complaint on February 8, 1941 (R. 32). The order allowing appeal was filed the same day (R. 40). Probable jurisdiction was noted March 31, 1941. The jurisdiction of this Court is based upon the Act of August 24, 1937, c.

754, Sec. 3, 50 Stat. 751, 752-753, 28 U. S. C. Supp. V, § 380a.

QUESTION PRESENTED

Congress authorized the construction of a flood control project consisting of a dam and reservoir, with power facilities, on the Red River at a place where the river is nonnavigable. The question is whether this action of Congress is valid either (1) as an exercise of its power to regulate interstate commerce, or (2) as an exercise of its power to spend in aid of the general welfare, or (3) as an exercise of both said powers.

STATUTES INVOLVED

The pertinent Sections of the Act of June 22, 1936, c. 688, 49 Stat. 1570, the Act of June 28, 1938, c. 795, 52 Stat. 1215, and the Act of October 17, 1940, Public, No. 868, c. 895, 76th Cong., 3d Sess., are set forth in Appendix A, pp. 75-79, *infra*.

STATEMENT

By this suit the State of Oklahoma seeks to enjoin both the construction of, and the condemnation of lands for, the Government's Denison Dam and Reservoir Project on the Red River (R. 12-13). The court below, with three judges sitting, upheld the constitutionality of the Acts authorizing the project, denied the injunction, and dismissed the complaint (R. 32-33).

1. *Prior litigation.*—The State's first effort to halt work on the Denison project was made on Oc-

tober 2, 1939, when it filed with this Court a motion for leave to file a bill of complaint asking an injunction against Harry H. Woodring, then Secretary of War. A rule to show cause was issued and the Secretary filed a response in which, after suggesting several jurisdictional difficulties which he did not press, he took the position that the project was constitutionally authorized and that the proposed bill therefore did not state a cause of action. The motion for leave to file was denied by an equally divided Court on February 12, 1940. *Oklahoma v. Woodring*, 309 U. S. 623.

The present suit was filed in the district court on September 6, 1940. The complaint in this case, except for the parties named as defendants, is substantially identical with the complaint in the *Woodring* case.

2. Statutory Authorization for the Denison Project.—The Denison dam and reservoir were authorized by Congress on June 28, 1938, c. 795, 52 Stat. 1215, as part of a nation-wide plan of flood control. The project represented the culmination of extended legislative consideration of the problem of floods on the Red River, in connection with the larger problem of flood control on the Mississippi River.

Congress has concerned itself with the Mississippi flood situation since about 1850.¹ The first

¹ A history of early flood-control legislation appears in Elliott, *The Improvement of the Lower Mississippi River for Flood Control and Navigation* (1932), pp. 1-21.

efforts were directed largely to floods in the lower Mississippi Valley; the Mississippi River Commission was formed in 1879 to deal with this situation. But it was soon discovered that flood-control efforts could not be so narrowly limited, and the jurisdiction of the Commission was, therefore, gradually extended on the Mississippi itself and over its tributaries. Later, as the extent of the problem and the inability of the states to deal with it came to be realized,² efforts were begun, commencing with enactment of the so-called First Flood Control Act of March 1, 1917, c. 144, 39 Stat. 948, to evolve a comprehensive flood-control program on a national scale.

At the start, flood-control projects were limited to the construction of levees only, and under that policy an enormous system of levees were constructed up and down the Mississippi River and its tributaries. In 1927, however, there occurred the most disastrous flood on the Mississippi River in recorded history. This was followed by an intensive Congressional investigation,³ culminating in the enactment of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, providing for a com-

² See, e. g., H. Rept. 1072, 70th Cong., 1st Sess., pp. 18-20; H. Doc. No. 90, 70th Cong., 1st Sess., p. 11; H. Rept. 2583, 74th Cong., 2d Sess., p. 2; S. Rept. 1662, 74th Cong., 2d Sess., p. 2.

³ Hearings, H. Comm. on Flood Control, 70th Cong., 1st Sess., 7 Vol.; Hearings on Flood Control, S. Comm. on Interstate Commerce, 70th Cong., 1st Sess.

prehensive system of flood control for the Mississippi itself, and providing as follows with respect to the tributaries of the Mississippi (Sec. 10, 45 Stat. 538):

* * * the Secretary of War, through the Corps of Engineers, United States Army, is directed to prepare and submit to Congress at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and tributaries * * *;

The Act further required that the report on these projects should contain a study of the practicability of establishing a system of reservoirs to control floods on the tributaries and a discussion of the benefits which would accrue to navigation as a result of the effect of the reservoirs in stabilizing stream flow and preventing silting and erosion.

Such a report was submitted on January 3, 1936, and appears as House Document No. 378, 74th Cong., 2d Sess. (hereinafter referred to as "H. Doc. 378"). On June 22, 1936, Congress, after extended hearings,* passed the Food Control Act of 1936, c. 688, 49 Stat. 1570, authorizing the construction of various flood-control projects through,

* See Hearings before S. Comm. on Interstate Commerce, 74th Cong., 2d Sess., on S. 3531; Hearings, H. Comm. on Flood Control, 74th Cong., 2d Sess., on S. 3531.

out the country and directing the Secretary of War to continue investigation of other projects, including that at Denison (Sec. 7, 49 Stat. 1596).

In January 1937, the disastrous Ohio River flood occurred. The House Committee on Flood Control immediately passed a resolution directing the Chief of Engineers to submit a comprehensive flood-control plan for the Ohio and lower Mississippi Rivers. Pursuant to this resolution, the Chief of Engineers submitted a report in April 1937 (Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess.), in which he recommended, among other things, the construction of 24 flood-control reservoirs on tributaries of the Mississippi, including the Red River (p. 11). With respect to the Denison Project, he stated (p. 7):

A reservoir at Denison, Tex., on the lower Red River, immediately below the mouth of the Washita, would remove the threat of the coincidence of a large flood from the Red with a flood in the Mississippi, and would also afford highly desirable protection to the fertile bottom lands in the lower Red River Valley.

And again (p. 8):

The recent great flood on the Ohio is a convincing proof of the need for developing the maximum reservoir capacity to reduce flood discharge on that stream. The development of reservoir flood control on the other streams should not await a similar

flood disaster, but should be undertaken in advance thereof. On the Red River, for example, investigations indicate that a flood far exceeding any of record is distinctly possible. The Denison Reservoir would prevent such a flood from reaching disastrous proportions in the valley below it.

Pursuant to the direction contained in Section 7 of the Flood Control Act of 1936, the Secretary of War transmitted to Congress on March 12, 1938, a report from the Chief of Engineers, United States Army, which appears as House Document No. 541, 75th Cong., 3d Sess. (hereinafter referred to as "H. Doc. 541").¹ This report recommended construction of a dam and reservoir at Denison for the combined purposes of flood control and the development of hydroelectric power (pp. 10, 79). Extensive hearings were thereupon held by the House Committee on Flood Control (Hearings before the House Committee on Flood Control on H. R. 10918, 75th Cong., 3d Sess., pp. 605-686). On June 28, 1938, Congress passed the Flood Control Act here challenged, authorizing the construction of additional projects, including the one at Denison. The Act provides (52 Stat. 1215, 1216, 1219):

SEC. 4. That the following works of improvement for the benefit of navigation and

¹Copies of H. Doc. 541 have been filed with the Clerk. The relevant portions of Appendix H to this document, which is referred to in the report (p. 29) but is not printed as a part of it, are set forth in Appendix B, pp. 80-96, *infra*.

the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports herein-after designated: * * *

The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000 * * *.

A total of \$13,200,000 has been allotted from appropriations for the fiscal years 1940 and 1941 for the construction of the project. Act of June 28, 1939, c. 246, 53 Stat. 856; Act of June 24, 1940, Pub., No. 633, c. 415, 76th Cong., 3d Sess.; see H. Rept. 604, 76th Cong., 1st Sess. p. 4; Hearings, S. Subcom. on Appropriations on H. R. 6260, 76th Cong., 1st Sess., p. 13.

In the Act of October 17, 1940, Public, No. 868, c. 895, 76th Cong., 3d Sess., which authorizes the improvement of certain rivers and harbors in the interest of national defense, Congress further declared:

SEC. 4. The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act

approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses.

3. *The Denison Dam and Reservoir.*—The Red River rises near the eastern edge of New Mexico and flows generally eastward to Fulton, Arkansas, crossing the Texas Panhandle and forming the boundary between the States of Oklahoma and Texas; from Fulton the river flows south into Louisiana where it enters the Mississippi at Red River Landing. The Denison Dam will be located in Oklahoma and Texas, 751 miles above the mouth of the Red River (H. Doc. 541, p. 2). The Reservoir will extend upstream along the Red River and Washita River valleys. Provision has been made for the necessary relocation of highways, railroads, and public utilities (H. Doc. 541, pp. 56-57).

The project will control floods originating above Denison and afford protection below it in Oklahoma, Texas, Arkansas, and Louisiana. It will also benefit navigation on the Red River by stabilizing the flow, decreasing bank caving, and silt carriage, and otherwise, as hereinafter more fully discussed. In addition, provision has been made for the generation of hydroelectric power since this will make the project more economically

⁶ *Oklahoma v. Texas*, 260 U. S. 606, 636.

practicable. The power plant will be located on the Texas side of the dam and water will be run through its turbine and returned to the river about one mile below the dam embankment. No determination has yet been made as to what disposition will be made of the power generated. (H. Doc. 541, pp. 9, 11, 12, 49, 67, 79, 94.)

We are advised that up to the present time the United States has acquired title to over 23,000 acres of land and that the clearing of the dam site, the excavation for the outlet works, and a substantial amount of construction have been completed.

Since appellant suggests (R. 7-8; see Br. 9-11, 32-35) that certain authorized changes which have been made in the original specifications have altered the character of the project, we outline briefly the precise nature of the modifications. House Document 541 contemplated a dam with a top elevation of 695 feet above mean gulf level and made the following allocation of reservoir capacity (p. 45):

- (a) *Dead storage*.—Stream bed elevation 505 to lower power pool elevation 595, 1,400,000 acre-feet.
- (b) *Power pool storage*.—Elevation 595 to elevation 620, 2,000,000 acre-feet.
- (c) *Flood pool storage*.—Elevation 620 to crest of spillway, elevation 660, 5,900,000 acre-feet.

(d) *Detention flood storage.*—Storage above spillway crest, elevation 660, to the maximum reservoir surface reached by the impounded flood-waters, which in the case of the maximum probable flood would be 6,400,000 acre-feet for elevation 687.

As stated (p. 8, *supra*), Congress authorized the dam as described in House Document 541 "with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable." Pursuant to this authority the engineers continued to study the project and prepared detailed specifications which were embodied in a two-volume report entitled "Definite Project for Denison Dam and Reservoir—Red River." This report has been approved by the Chief of Engineers and the Secretary of War and will be referred to in this brief as the "Definite Project."

The final specifications call for a dam with a top elevation of 670 feet and make the following allocations of reservoir capacity (Def. Proj. pp. 10-14, *infra*, pp. 97-104):

(a) *Dead storage.*—Stream bed elevation 505 to lower power pool elevation 587, 1,020,000 acre-feet.

(b) *Power pool storage.*—Elevation 587 to elevation 617, 2,060,000 acre-feet.

⁷ A copy of this document has been filed with the Clerk, and the pertinent parts are printed as Appendix C to this brief (pp. 97-110, *infra*).

(c) *Flood pool storage*.—Elevation 617 to crest of spillway, elevation 640, 2,745,000 acre-feet. ✓

(d) *Detention flood storage*.—Storage above spillway crest, elevation 640, to maximum reservoir surface reached by the impounded flood waters. In the case of the maximum probable flood, this would be approximately ~~53~~⁵³,000,000 acre-feet for elevation 66~~12~~¹². See Appendix A to Def. Proj. Plate A-23.

The reduction in the total amount of flood control storage is explained as follows (Def. Proj. p. 12, *infra*, p. 100):

The amount of flood control storage to be provided is dependent upon the economic returns or benefits which will result from the protection afforded by the flood storage provided. * * * The annual benefits increase very little when floods greater than the 1908 flood, the maximum flood of record, are controlled, while the costs of providing this control increased rapidly. Accordingly, storage to control floods equal in magnitude to the 1908 flood, the largest of record, is all that can be economically justified.

Translated into dollars and cents the changes in the specifications will result in reducing the total an-

* The outlets can be operated so as to provide an additional 758,000 acre-feet for flood storage. Moreover, the figure given in the text represents the amount of flood storage which would be available if the power pool was at maximum elevation when the flood occurred. (Appendix D to Def. Proj., p. 10, *infra*, p. 109-110.)

nual flood benefits by only \$153,800. House Document 541 (p. 7) estimated that the annual flood control benefits would be \$1,766,880 (see also p. 96, *infra*). Using the same method of computation the annual flood control benefits from the modified project will be \$1,613,080 (App. D to Def. Proj. pp. 1-3, *infra*, pp. 104).*

The statement is made in appellant's brief (pp. 11, ~~33~~) that in the project as outlined in House Document 541, 37 per cent of the inundated acre-feet is for water storage for power and 63 per cent for flood control, while in the project as modified, 53 per cent of the inundated acre-feet is for water storage for power, and 47 per cent is for flood control. This statement is misleading in the extreme. In the first place, it ascribes the dead storage pool to the power aspect of the dam alone, whereas in fact, as House Document 541 as well as the Definite Project plainly show, this pool is designed in large part for the accumulation of silt and would therefore be necessary even if the dam were built for

* While appellant discusses the changes in the original specifications at some length (Br. 9-11, 32-35) it does not suggest that in making these modifications the engineers or the Secretary of War exceeded the authority given them in the 1938 Act. In any event, as the court below held (R. 27), Congress has ratified the modifications. As pointed out in appellant's brief (p. 33) Congress was advised of the changes which had been made. Hearings, S. Subcom. on Appropriations on H. R. 6260, 76th Cong., 1st Sess., pp. 25-26, 201. Thereafter Congress appropriated money for the project, Act of June 28, 1939, c. 246, 53 Stat. 856, and passed the Act of October 17, 1940, *infra*, p. 79.

flood control purposes alone (H. Doc. 541, pp. 45-46; Def. Proj., pp. 10, 11, *infra*, pp. 98-99).¹⁰ Deducting the dead storage from the acre-feet of water devoted to power, the figures as to the allocation of storage in the Definite Project are: 1,020,000 acre-feet for dead storage; 2,060,000 acre-feet for power; 2,745,000 acre-feet for flood control. See Definite Project, pp. 10, 11, 12, *infra*, pp. 98-102. In the second place, appellant omits from consideration the detention flood storage, which, in the case of the maximum probable flood, would provide temporary storage, for flood control purposes alone, for approximately 3,300,000 acre-feet of water in addition to the 2,745,000 acre-feet in the flood pool. In the light of these considerations, appellant's statement that 53 per cent of the storage is to be for power and only 47 per cent for flood control is obviously erroneous.

Appellant's statement that 82 per cent of the height of the dam is allocable to power and only 18 per cent to flood control (Br. p. 11) is erro-

¹⁰ The Definite Project explains as follows the necessity for dead storage (Def. Proj., pp. 10-11, *infra*, pp. 98-99): "The term 'dead storage' applies to the space in the Denison Reservoir for the deposit of silt which would otherwise reduce the efficiency and economic worth of the flood-control storage, since the Red River is a heavy carrier of silt." (Cf. H. Doc. 541, p. 46). It also states (Def. Proj., p. 10, *infra*, p. 97): "The dead storage, which must be provided for the accumulation of silt, makes available sufficient head for the development of hydroelectric power, so that a failure to develop such power would represent an economic waste."

neous for the same reasons. Appellant's figures in this respect are particularly misleading for the reason that the part of the dam allocated to flood control is the upper part which stores a much greater volume of water per foot of height than the lower part. This is established by the statement of the District Engineer, appearing in House Document 541, that if the dam were designed for flood control alone, it would be but 20 feet lower in height than the combined project (see H. Doc. 541, p. 42). This statement had reference to the dam as it was planned before the Definite Project. It indicates, however, that the height of the dam allocable to power alone is small.

4. The present suit.—The complaint (R. 1-13), as amended (R. 17-19), alleges that the Red River is not navigable within the State of Oklahoma (R. 2), that the Denison project is not for a public purpose, and that therefore the Act of June 28, 1938, authorizing construction of the dam and reservoir exceeds the power vested in Congress by Section 8 of Article I of the Constitution and "contravenes the rights and powers" reserved to Oklahoma by the Tenth Amendment (R. 12). It is further alleged that the Act of October 17, 1940, which was passed after the filing of this suit, is likewise unconstitutional and "only a self-serving Congressional declaration". (R. 18.)

Construction of the project will, it is alleged, injure the State in the following manner: Approx-

mately 100,000 acres of land in Oklahoma will be inundated, much of which "is rich soil, in a high state of cultivation" or "has large potential oil reserves" and 3,800 acres of which are owned by the State; many miles of highways, rights-of-way, and bridges will be destroyed; the southern bank of the river, heretofore fixed by this Court as the boundary mark between Oklahoma and Texas, will be obliterated; and the waters of the Red River and the Washita, one of its tributaries, will be taken without compensation for the generation and sale of electric power. The complaint also alleges that the taking and inundation of the lands incident to the project will deprive the State and its political subdivisions of future tax revenues and will burden the State with "a serious social and economic problem" resulting from the removal of its citizens from the area to be inundated (R. 11).

The complaint names as defendants the Guy F. Atkinson Company, a Nevada corporation, alleged to be proceeding with the construction of the dam under contract with the Government; and Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney, Department of Justice, who are alleged to be engaged in the prosecution of condemnation proceedings. The prayer is that the Atkinson Company be restrained from building the dam and that Summers and Harris be restrained from instituting or conducting condemnation proceedings (R. 12-13).

The Government moved to dismiss on the grounds that (1) the suit was in reality brought against the United States without its consent, (2) the Secretary of War was an indispensable party, (3) the State has an adequate remedy at law, and (4) the complaint fails to state a cause of action because the Act of Congress pursuant to which the defendants are proceeding is constitutional (R. 19-21).

In accordance with the Act of August 24, 1937, c. 754, Sec. 3, 50 Stat. 751, 28 U. S. C., Supp. V, § 380a, the case was heard before the district court with three judges sitting. Upon oral argument counsel for the State conceded that if the statute in question is constitutional the motion to dismiss should be sustained. They further conceded that in the determination of that question no evidence was necessary or proper (R. 26).

The court, after first deciding that the case was properly before it (R. 25), held that the Act authorizing the construction of the project "is valid under the power of Congress to regulate and control interstate commerce" (R. 29). The court found it unnecessary to decide whether "it might be valid under any other clause of the Constitution" (R. 29). Judgment was entered sustaining the motion to dismiss and denying the injunction (R. 32-33). From that judgment this direct appeal has been taken (R. 40).

SUMMARY OF ARGUMENT

The District Court held that this is not a suit against the United States and that the Secretary of War is not an indispensable party. These rulings are doubtful, but not certainly incorrect. The authorities on both questions are collected in the Government's brief in *Brooks v. Dewar*, No. 718, this Term.

As pointed out in that brief, this Court has on several occasions recognized an exception to the general rule as to suits against the Government by holding that a suit brought against a government officer to enjoin a wrongful invasion of the plaintiff's property rights is a suit against the officer individually and not one against the Government. While this exception appears to be contradicted by other cases and is difficult to reconcile logically with the general rule as to suits against the Government, it has, nonetheless, been recognized with a reasonable degree of consistency. Accordingly, we do not feel obliged to question it in this case.

We submit the question of whether the Secretary of War is an indispensable party on the brief in the *Dewar* case. Whatever conclusion the Court reaches in that case would seem equally applicable here.

There is also doubt as to whether the complaint shows such irreparable injury to the appellant as

to entitle it to equitable relief. Many of the allegations with respect to damage to the State set forth alleged invasions of sovereign rights as distinguished from legal or equitable rights of person or property. The others allege injury for which there seems to be no adequate remedy at law. However, the question is far from clear. Although when a State sues, it accepts the ordinary limitations upon equity jurisdiction, in doubtful cases the Chancellor's conscience might well lean toward hearing the complaint of the State. Under these circumstances, we waive any claim that the complaint shows too little injury to invoke the powers of the equity court. This waiver is doubtless insufficient to foreclose an issue which may be examined by the Court *sua sponte*. But it is a fact which may legitimately be given heavy weight in the decision of that issue. *Helvering v. Davis*, 301 U. S. 619, 639, 640.

II

The court below held that the construction of the Denison Project for the benefit of navigation and flood control was a proper exercise of the power of Congress to regulate and control interstate commerce. That ruling was plainly correct.

In both the Flood Control Act of 1938 and in the Act of October 17, 1940, Congress declared that one of its purposes in authorizing the construction of the dam and reservoir was to improve navigation. Appellant in effect asks this Court to dis-

regard the Congressional determination thus declared and to invalidate the legislation, not on the ground that the dam and reservoir will have no effect upon commerce, but on the ground that the admitted effect that it will have upon commerce, as described in House Document 541, is not sufficient to justify the project. This, we submit, is beyond the competence of the courts. Judicial review is, we believe, limited to determining whether or not the legislation is in fact a regulation of interstate commerce; if it is such a regulation, the legislation is within the commerce power of Congress, irrespective of any economic assessment of commerce benefits against project costs. *Arizona v. California*, 283 U. S. 423, 452-446; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326-330; cf. *United States v. Appalachian Power Co.*, 311 U. S. 377, 424, 426-427.

But apart from the inadequacy of the complaint, House Document 541 furnishes ample proof of the validity of the Denison Project under the commerce power of Congress. The project will have a two-fold effect upon commerce: first, by promoting the navigability of the Red River on its lower stretches, it will help to develop that river as an instrumentality of interstate transportation; and second, by removing the danger of disastrous floods, it will prevent destruction of the arteries of interstate commerce.

The Red River was held not to be navigable at Denison in *Oklahoma v. Texas*, 258 U. S. 574. But

the lower stretches of the river are navigable, and more than \$4,000,000 has been expended for the improvement of navigation on the river. The Denison Project will make a substantial contribution toward the further improvement of the river for navigation by decreasing bank caving and silt carriage, by helping toward the stabilization of the flow of the river, and by furnishing more dependable navigation stages. Furthermore, by removing the danger of floods of disastrous proportions in the lower Red River Valley, the project will prevent destruction of facilities used for navigation.

Furthermore, the project will remove the threat of a coincidence of a large flood from the Red River with a flood on the Mississippi River. In this respect the dam and reservoir are in aid of navigation on the Mississippi, since insofar as they tend to prevent disastrous floods on the Mississippi, they tend to reduce the damage to the waterway and to navigation facilities caused by such floods.

The Denison Project is also a valid exercise of the commerce power of Congress because, by removing the danger of disastrous floods, it will prevent destruction of the arteries of interstate commerce. The facts presented to Congress clearly show that a large flood would destroy bridges, roads, railroad tracks, and other instrumentalities of commerce. Prevention of such destruction to the arteries of commerce is well within the power of Congress. *Gilman v. Philadelphia,*

3 Wall. 713; *Second Employers' Liability Cases*, 223 U. S. 1, 47; *Arizona v. California*, 283 U. S. 423; *Ashwander v. Tennessee-Valley Authority*, 297 U. S. 288.

Since these benefits to commerce will result from the project, the Government's right to undertake the project cannot be defeated by the fact that the dam will be built at a point where the river is not navigable. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690; *California Oregon Power Co. v. Cement Co.*, 295 U. S. 142, 159; *United States v. Utah*, 283 U. S. 64. We need not contend that the benefits to commerce which will result from the project will be commensurate with its cost, or that the project would have been recommended by the Army engineers for that purpose alone; since the project does in fact protect and promote interstate commerce, it is within the commerce power of Congress, even though the economic and engineering decision of Congress might have been different if no other purpose would be served by the dam.

III

Authorization of the Denison project is also a proper exercise of the power of Congress to spend for the general welfare. It is settled that Congress has power to expend public moneys for the general welfare, and that the exercise of this power is not limited to the other enumerated powers. *Steward Machine Co. v. Davis*, 301 U. S. 548, 586-587; *Helvering v. Davis*, 301 U. S. 619, 640.

Congress has a wide range of discretion in determining what will promote the general welfare; its action will not be disturbed by the courts unless it is so plainly wrong as to constitute a display of arbitrary power.

Authorization of the Denison dam and reservoir was a deliberate decision by Congress, made after extensive investigation and consideration, that the project would promote the public welfare. At the time it made that decision, Congress had before it a wealth of evidence showing the regional and national benefits to be derived from the project. Consideration of these benefits leads to the inevitable conclusion that construction of the dam and reservoir is an unassailable object of expenditure under the welfare clause.

Not only is the object of the expenditure within the welfare power of Congress but the method of achieving that object is also clearly a proper exercise of the power. The welfare clause authorizes appropriations for acquisition and construction as well as for mere disbursements; only halting provision could be made for the general welfare if the power of Congress over public funds were limited simply to expenditure, divorced from the acquisition or construction of property as a result of the expenditure. And it is clear that as an incident of its power to authorize construction of the project, Congress has power to authorize the use of eminent domain to acquire the lands necessary for

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the project. See *United States v. Gettysburg Electric Ry.*, 160 U. S. 668.

IV

Since the Denison project is a valid exercise of the powers granted Congress to regulate interstate commerce and to spend for the general welfare there is no merit in the contention that the Tenth Amendment is violated. *United States v. F. W. Darby Lumber Co. et al.*, No. 82 this Term, decided February 3, 1941.

ARGUMENT

I

THE JURISDICTION OF THE DISTRICT COURT

The district court held that this is not a suit against the United States and that the Secretary of War is not an indispensable party (R. 25). These rulings are doubtful, but not certainly incorrect.

A. The Suit May Be One Against the United States.—The bill is laid against the Government's contractor and officials of the Department of Justice (R. 1-2, 8-9). None is alleged to have any personal interest in the controversy and each is made a defendant only because he is using and has threatened to use his official powers and the property of the United States to carry out the mandate of Congress (see R. 8-9).

The Government's brief in *Brooks v. Dewar*, No. 718, this Term, pp. 12-23, contains an elaborate

collation of the cases which need not be repeated here. It is sufficient to point out that the suit seeks to control the acquisition of property by the Government, to control by judicial decree the functioning of the United States, and is brought against the defendants in their capacity as officers and agents of the United States. Many decisions of this Court hold that, under these circumstances, the suit is in fact brought against the United States and may not be maintained without its consent (Br. No. 718, pp. 15-19).

However, the Court from time to time has introduced a number of exceptions into this rule (Br. No. 718, pp. 19-22). One of these exceptions appears applicable here. The State of Oklahoma now has undoubted title to and possession of some 3,800 acres which will be inundated through construction of the dam (R. 4). If that project is not authorized by a valid law of Congress, the defendants may be said to be acting as individuals and to threaten a wrongful invasion of the property rights of the State. By such reasoning, this Court on several occasions has held that the plaintiff who seeks to protect his property and possession has brought suit not against the Government but only against the officer. *In re Tyler, Petitioner*, 149 U. S. 164, 190; *Allen v. Baltimore & Ohio Railroad Company*, 114 U. S. 311, 314-317; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620; see *Colorado v. Toll*, 268 U. S. 228 (see Br. No. 718, pp. 20-21).

These cases are difficult to reconcile with the general rules as to suits against the Government.

- (a) Whether or not the action is laid against the Government must be fixed by the nature of the Government's interest in the controversy, not by that of the plaintiff. (b) In every case, the plaintiff may be supposed to file his complaint to protect some right or interest. Whether this interest is real or personal, quasi-sovereign or personal, possessory or contractual, would seem in logic to be an inquiry wholly irrelevant to whether the suit is brought against the officer as an individual or as a representative of the United States.
- (c) The cases cited above seem to be contradicted by *Hagood v. Southern*, 117 U. S. 52, 67-69, and *In re Ayers*, 123 U. S. 443, 489, 493-506, where the plaintiffs were held unable to enjoin the tax collector's invasion of their property.

The exception to the rule of immunity which permits the plaintiff to challenge acts injurious to his admitted property rights is an exception which, though difficult logically to reconcile with the immunity of the sovereign, has yet been recognized with a reasonable degree of consistency. We do not feel obliged to question it in this case.

B. The Secretary of War May Be An Indispensable Party.¹¹—Again, the Government's brief in

¹¹ There is a corresponding question as to whether the Attorney General is an indispensable party, since the defendants Summers and Harris are acting under his direction.

Brooks v. Dewar, No. 718, this Term, pp. 27-35, contains a full discussion of the conflicting authorities and policies which relate to this question. Whatever conclusion the Court should reach in that case would seem equally applicable here.

C. *Equity Jurisdiction Is Doubtful But Not Challenged*.—It is doubtful whether the complaint shows such irreparable injury to the appellant as to entitle it to equitable relief. This question was raised by the motion to dismiss (R. 20-21) but is not discussed in the opinion of the district court.

Many of the allegations of damage set forth allege invasions of sovereign rights as distinguished from legal or equitable rights of person or property. Thus, the bill alleges appellant's rights to preserve the integrity of its political subdivisions (R. 9-10), to preserve its southern boundary marker (R. 10), to maintain jurisdiction over the territory to be inundated (R. 10), and to be free from social and economic problems resulting from evacuation of the reservoir area (R. 11). It is not clear that such allegations establish irreparable injury or show a justiciable controversy. See *Massachusetts v. Mellon*, 262 U. S. 447; *New Jersey v. Sargent*, 269 U. S. 328, 330-334; *New York v. Illi-*

This issue was not raised by the motion to dismiss (R. 19-21) but it was urged on oral argument. Since, if the Secretary of War is an indispensable party, the suit must fail, it is unnecessary to urge that the Attorney General, too, should have been named as defendant.

nois, 274 U. S. 488, 489-490; *Georgia v. Stanton*, 6 Wall. 50, 75-77.¹²

The remaining allegations with respect to injury to appellant relate to the threatened taking and inundation of 3,800 acres of state-owned land, the destruction of public highways and bridges, the diversion without compensation of waters alleged to belong to the State, and the impairment of state revenues derived from taxes on the land to be inundated (R. 9-11). Insofar as any state property is taken, the State will receive just compensation therefor and consequently is not threatened with irreparable injury. *Hurley v. Kincaid*, 285 U. S. 95, 104. Moreover, all defenses based on lack of power in the United States to prosecute the project will be available to appellant at the time its land is condemned. *Cavanaugh v. Looney*, 248 U. S. 453, 456. There is no threat of diversion without compensation of waters alleged to belong to appellant since the Act of 1938 expressly saves to Oklahoma the right to continue

¹² Appellant asserts (Br. 21-22) that the suit is brought as *parens patriae* of its citizens. While there is at least some analogy to *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Kansas v. Colorado*, 206 U. S. 46, 95-96; and *Wisconsin v. Illinois*, 278 U. S. 367, 281 U. S. 179, the individuals affected by the project have available remedies such as a defense to condemnation proceedings or a suit under the Tucker Act, c. 231, 36 Stat. 1093, 1136, by which their rights may be protected. Accordingly, there may be no occasion for the State to bring suit on their behalf. See *Oklahoma v. Cook*, 304 U. S. 387, 393-396.

to exercise all existing proprietary or other rights of supervision of and jurisdiction over the waters of all tributaries of the Red River within the State above the dam site. 52 Stat. 1219-1220, 78, *infra*; see 83 Cong. Rec., p. 8601, 75th Cong., 3d Sess.¹³ And if the State should have any proprietary rights in the river¹⁴ which will be invaded by construction of the project, it may receive compensation for the injury by instituting suit under the Tucker Act. C. 231, 36 Stat. 1093, 1136, 28 U. S. C., §§ 41 (20), 250 (1).

With respect to the allegations (R. 9-10) of impairment of state revenues derived from taxes on the land to be inundated, it may be noted that, since full compensation is to be paid for the property, the total taxable wealth of the State is not necessarily decreased, and may be materially increased, by the project. Moreover, it may be

¹³ Moreover, there is no foundation in fact for the allegation in the complaint that the waters of the river will be used to generate power for distribution in Texas (R. 6). H. Doc. 541 shows that no conclusion has been reached as to the disposal of the power to be generated (pp. 10, 12) and there is consequently no presently existing threat of diversion of the power. Furthermore, under the doctrine of *Arizona v. California*, 298 U. S. 558, 566, a state may not complain of diversion unless it has taken some positive steps to make use of the water itself.

¹⁴ The extent of the state's ownership of waters in non-navigable streams presents one of the principal questions of law involved in *Nebraska v. Wyoming*, No. 8, Original, this Term, now pending before this Court on reference to a Special Master.

doubted whether the State's interest in the preservation of the value of taxable property within the State gives it standing to enjoin the acquisition of such property by condemnation or purchase for the purpose of subsequent inundation. *Florida v. Mellon*, 273 U. S. 12, 17-18, cf. *Franklin Tp. in Somerset County, N. J. v. Fugwell*, 85 F. (2d) 208 (App. D. C.).

These considerations suggest that, measured by ordinary rules of equity jurisdiction, the complaint fails to show irreparable damage. Yet they do not seem wholly persuasive. Although when a state sues, it accepts the ordinary limitations upon equity jurisdiction (see *California v. Latimer*, 305 U. S. 255), in doubtful cases, the chancellor's conscience might well lean toward hearing the complaint of the state, asserting both political and property rights. Cf. *Missouri v. Holland*, 252 U. S. 416; *Colorado v. Toll*, 268 U. S. 228.

Under these circumstances, we waive any claim that the complaint shows too little injury to invoke the powers of an equity court. This waiver is doubtless insufficient to foreclose an issue which may be examined by the Court *sua sponte*. But it is a factor which may legitimately be given heavy weight in the decision of that issue. *Helvering v. Davis*, 301 U. S. 619, 639-640. We conclude, therefore, that the Court is entitled in the exercise of its equity jurisdiction to decide the issues presented by the complaint.

In summary, there is very serious doubt as to the power or the propriety of the court below giving a decision on the merits. We urge none of the possible objections, but recognize that they cannot lightly be brushed aside. The inconclusive nature of our discussion reflects, we believe, a corresponding uncertainty in the decisions. Under such circumstances, unless the issues be determined in *Brooks v. Dewar*, No. 718, this Term, the Court might find it appropriate to consider the controversy on the merits. If it agrees with our contentions on the merits, it will be unnecessary to decide the questions of jurisdiction. Cf. *Inland Waterways Corp. v. Young*, 309 U. S. 517; *Woodring v. Wardell*, 309 U. S. 527; *Perkins v. Lukens Steel Co.*, 310 U. S. 113.

II

THE DENISON DAM AND RESERVOIR PROJECT IS A VALID EXERCISE OF THE COMMERCE POWER OF CONGRESS

The court below rested its decision upon the proposition that the construction of the Denison Project for the benefit of navigation and flood control was a proper exercise of the power of Congress to regulate and control interstate commerce (R. 29). Having so concluded, the court below found it unnecessary to pass upon whether the project might also be valid "under any other clause of the constitution" (*id.*). The ruling that the project is a valid exercise of the commerce power is, we submit, plainly correct.

A. THE ISSUE POSITED BY THE COMPLAINT

It is essential to note, at the outset, the precise issue presented by the complaint. Appellant does not allege that the Denison Project will have no effect upon interstate commerce; it alleges only that, *except as set forth in House Document 541*, the project will not "protect or improve the navigable portions of the lower reaches of the Red River or the Mississippi River," or otherwise improve navigation or regulate the flow of the Red River or serve other beneficial uses (R. 18). With respect to House Document 541, the complaint alleges that this shows only that the project will have an "intangible, indirect, inconsequential, and unsubstantial" effect upon commerce (*id.*). It is apparent from these allegations that appellant admits that the project will have some effect upon interstate commerce—the effect shown by House Document 541—and rests its case solely upon the legal conclusion that this effect is only indirect and unsubstantial. In our view, such a pleading does not state a case justifying judicial review of the Congressional action.

Congress plainly determined that the Denison Project would be in aid of navigation. Section 4 of the Flood Control Act of 1938 (*infra*, p. 77), which authorized construction of various flood control projects, including that at Denison, stated that these projects were "for the benefit of navigation and the control of destructive floodwaters and other

purposes . * * *." Again, in the Act of October 17, 1940, Public No. 868, c. 895, 76th Cong., 3rd Sess., Congress reiterated its declaration that the Denison Project is "for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses." And, as we show below, in House Document 541, incorporated by reference in the Flood Control Act of 1938, there is ample reference to the effect of the project upon interstate commerce.

Appellant in effect asks this Court to disregard the Congressional determination thus declared and to invalidate the legislation, not on the ground that the dam and reservoir will have no effect upon commerce, but on the ground that the admitted effect that it will have on commerce, as described in House Document 541, is not sufficient to justify the project. This, we submit, is beyond the competence of the courts. Judicial review is, we believe, limited to determining whether or not the legislation is in fact a regulation of interstate commerce; if it is such a regulation, the legislation is within the commerce powers of Congress, irrespective of any economic assessment of commerce benefits against project costs. This is the unequivocal teaching of *Arizona v. California*, 283 U. S. 423, 452-456, and *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326-330. Cf. *United States v. Appalachian Power Co.*, 311 U. S. 377, 424, 426-427.

But we need not rely upon the inadequacy of the complaint. Analysis of the admitted effect of the Denison Project upon commerce, as set forth in House Document 541, shows that construction of the dam and reservoir is well within the power of Congress because the project will aid in the improvement of navigation and the control of flood waters, and will serve to prevent the interruption of interstate commerce by floods.

B. THE DENISON PROJECT WILL AID IN THE IMPROVEMENT OF NAVIGATION AND IN THE CONTROL OF FLOOD WATERS

The Red River was held to be not navigable at Denison in *Oklahoma v. Texas*, 258 U. S. 574, and we assume, *arguendo*, that that decision is controlling here. But, as the opinion in *Oklahoma v. Texas* discloses (p. 582), east of Oklahoma the Red River flows 557 miles through Arkansas and Louisiana to the Mississippi River. Appellant does not question the navigability of these lower stretches of the river. In fact, before the advent of railways in the latter half of the nineteenth century, the river formed the principal artery of transportation into its basin. While commerce in substantial volume is now limited to the section between Alexandria, Louisiana, and the Mississippi, a distance of about 122 miles, goods valued at approximately \$2,000,000 are carried each year (H. Doc. 541, pp. 3, 65). The fact that parts of the river are no longer used for commerce does not, of course, militate

tate against the federal power in respect of them.
Economy Light Co. v. United States, 256 U. S.
113, 123.

The initial project for the improvement of navigation upon the river was undertaken in 1828, and up to June 30, 1936 expenditures for that purpose totaled over \$4,000,000. The Denison project will make a substantial contribution toward the further improvement of the river for navigation. In the first place, the project will decrease bank caving and silt carriage. Secondly, investigations have established that stabilization of the flow is essential to a dependable navigation system on the river. Such stabilization can only be obtained by the construction of reservoirs. In this connection "the Denison Reservoir would be of considerable benefit" as the regulated discharge "would increase low-water flows and furnish more dependable navigable stages." (H. Doc. 541, pp. 3, 66-68, 72, 79.) And finally, by removing the danger of floods of disastrous proportions in the lower Red River Valley (Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess., pp. 7, 8), the project will prevent destruction of facilities used for navigation on the lower stretches of the river.

Furthermore, the project will "remove the threat of the coincidence of a large flood from the Red with a flood in the Mississippi" (Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess., p. 7; see H. Doc. 541, p. 86). In this respect the

dam and reservoir are in aid of navigation on the Mississippi, since insofar as they tend to prevent disastrous floods on the Mississippi, they tend to reduce the damage to the waterway and to navigation facilities caused by such floods.

Since these benefits to navigation will result from the project, the Government's right to undertake the project cannot be defeated by the fact that the dam is being built at a point where the river is not navigable. The power of Congress over navigation is not confined to the navigable portions of interstate streams. Just as Congress may regulate intrastate commerce in order to protect interstate commerce,¹¹ so it may exercise control over the non-navigable portions of a river in order to preserve or promote commerce on the navigable portions. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 703, 706, 708-710; *California Oregon Power Co. v. Cement Co.*, 295 U. S. 142, 158-159; *United States v. Utah*, 283 U. S. 64, 75, 90; *United States v. Eighty Acres of Land*, 26 F. Supp. 315, 320 (E. D. Ill.); *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6 (W. D. Va.); *United States v. Griffin*, 58 F. (2d) 674 (W. D. Va.); *United States v. 546.03 Acres*, 22 F. Supp. 775, 777 (W. D. Pa.).

We need not contend that the benefits to navigation which will result from the project will be commensurate with its cost or that the project

¹¹ *Houston & Texas Ry. v. United States*, 234 U. S. 342.

would have been recommended by the Army engineers for that purpose alone (see H. Doc. 541, pp. 9, 94). It seems plain enough that if the project does in fact protect and promote interstate commerce, it is within the commerce powers of Congress, even though the economic and engineering decision of Congress might have been different if no other purpose would be served by the dam, *Arizona v. California*, 283 U. S. 423, 452-456; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326-330; cf. *United States v. Appalachian Power Co.*, 311 U. S. 377, 424, 426-427.

These cases also make it plain that there is no occasion to determine the authority of the Federal Government to construct the Denison Dam for the purpose of power development alone, as an exercise of its welfare, war, or commerce powers. The proposed development of power in this project is plainly an incident of the flood control and commerce purposes, intended merely to make the project more economically feasible (see H. Doc. 541, p. 94). There is, accordingly, no question of its validity. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Arizona v. California*, *supra*; *Ashwander v. Tennessee Valley Authority*, *supra*; *United States v. Appalachian Power Co.*, *supra*.

Appellant stresses the proposition that the flood control and power purposes of the dam and reservoir are "functionally and physically separate" (Br. pp. 23, 35-39) meaning thereby, as we under-

stand the contention, that a dam and reservoir for flood control could be constructed without the inclusion of hydroelectric facilities and that the inclusion of such facilities does not aid in the flood control aspect of the project.¹⁶ From this premise, appellant proceeds to the conclusion that if it is within the competence of Congress to construct a project for flood control alone, but beyond its competence to construct one solely for power purposes, then, since a single purpose project would be "functionally and physically" possible, a multiple purpose project may not be undertaken. The argument treats as legally irrelevant the engineering fact that part of the project necessary for flood control is also available for power and that the inclusion of power facilities, although requiring a somewhat larger initial investment, renders the entire project economically feasible.

The *Chandler-Dunbar*, *Arizona* and *Ashwander* cases are to the contrary; and the recent decision in

¹⁶ Contrary to appellant's assertion (Br. p. 51), the addition of the hydroelectric facilities will improve the navigability of the river. The division engineer endorsing the report of the district engineer pointed out (H. Doc. 541, pp. 79-80): "It should be noted * * * that a dependable low water flow of 2,200 to 3,000 cubic feet per second which would result from construction and operation of the power project at Denison would be of distinct benefit to the small commerce now developed upon those reaches of the lower Red River which are included in approved navigation projects and might have a material bearing upon future studies of the Red River with a view to its further improvement."

United States v. Appalachian Power Co., supra, expressly approved the practice of adding hydroelectric facilities to dams erected for navigation and flood control. Unquestionably, as was there held, the recovery of the cost of improvements through utilization of power is a part of commerce control. The "fact that purposes other than navigation will also be served [by the dam] could not invalidate the exercise of the authority conferred even if those other purposes would not alone have justified an exercise of Congressional power."

Arizona v. California, 283 U. S. 423, 456. It is therefore clear that Congress was empowered to include in the Denison Dam facilities for the generation of electricity.

C. THE DENISON PROJECT WILL PREVENT THE INTERRUPTION OF INTERSTATE COMMERCE BY FLOODS

The Denison Project is also a valid exercise of the commerce power of Congress because, by removing the danger of disastrous floods, it will prevent destruction of the arteries of interstate commerce. In the basin of the Red River (as distinguished from its ordinary flood plain) there is a well-developed railroad system, the principal routes being from the Middle West to the Gulf of Mexico and from the East and Southeast to the West (H. Doc. 541, p. 24).¹⁷ These railroads cross the Red

¹⁷ Main line railroads in the basin are the Illinois Central, Texas Pacific, Missouri Pacific, Missouri, Kansas & Texas,

River over eleven bridges (H. Doc. 378, p. 263). Denison itself is a division point and the site of large railroad shops (H. Doc. 541, p. 24). Complementing these railroad lines is a comprehensive and well-maintained system of highways radiating in practically all directions from nine principal highway centers.¹⁸ From Denison the main highways extend north to Tulsa, Oklahoma, and St. Louis, Missouri, and south to the principal cities of Texas (H. Doc. 541, p. 23). The trunk highways are used by numerous interstate motor bus and freight lines (H. Doc. 541, pp. 23-24). There are eighteen highway bridges across the Red River and twenty-two ferry crossings (H. Doc. 378, p. 263). In addition, the region is traversed by many oil and gas pipe lines extending from the Southwest to the Middle West and North and serving such cities as Chicago and Detroit (H. Doc. 541, p. 24).

Although the report of the District Engineer states (H. Doc. 541, p. 29) that "there are but few of the works of man such as cities, villages, highways, or railway bridges, or even farm buildings

Santa Fe, St. Louis Southwestern, St. Louis and San Francisco, Illinois & Arkansas, Rock Island, Fort Worth & Denver, Kansas City Southern, and Louisiana Ry. & Navigation Co. (H. Doc. 378, pp. 35, 264).

¹⁸ The basin has 1,970 miles of federal roads, 4,930 miles of state roads, of which 1,250 miles are paved, and 2,980 miles of gravel roads, in addition to numerous county and municipal roads (H. Doc. 378, p. 36).

in the ordinary flood plain of the river," it is clear that any large flood on the Red River would disrupt interstate commerce. In the event of the maximum probable flood, and to a lesser degree in the event of a flood of lesser intensity, bridges and ferries would be washed away, stopping interstate transportation by rail, truck, or motorcar (H. Doc. 541, p. 4; *id.*, Appendix H, pp. 88, 91, 93, *infra*).¹⁹ Railroad tracks in the flooded area would be rendered unusable²⁰ and interstate highways would be flooded (*id.* pp. 85, 88, *infra*). Many of the pipe lines laid across the river would be destroyed or damaged (*id.* p. 95, *infra*). Telephone, telegraph, and power lines within the valley would be considerably damaged, thereby impairing interstate utility

¹⁹ The 1927 flood caused damage of \$30,000 to a toll bridge in Wichita County. Flood damages for the years 1924-1927 to another toll bridge amounted to about \$43,000, and \$15,000 damage was caused to a free bridge in Burk Burnett, Texas, in the 1928 flood (H. Doc. 378, pp. 372-373).

²⁰ Testimony appearing in Hearings before the House Committee on Flood Control, 75th Cong., 3d Sess., p. 658, shows that at Shreveport, Louisiana, the St. Louis and Southwestern Railroad was required to move its tracks three times within a short period because of flood velocity in the Red River. The 1908 flood caused \$250,000 damage to the Texas and Pacific Railway Company and interrupted traffic for two months on branch lines and one month on the main line. Forty miles of main-line track and 90 miles of branch-line track were affected. Bulletin of American Railway Engineering Association, Vol. 29, No. 303, Part II (1928), pp. 41, 44. The 1927 flood caused temporary discontinuance by the Louisiana R. & N. Company of regular service between Shreveport and Alexandria (*id.*, p. 83).

service (*id.*, p. 92, *infra*). Aviation facilities also lie in the path of any large flood. There is, for example, a municipal airport at Shreveport, Louisiana, representing an investment of \$300,000, which was only recently endangered by high water on the Red River (Hearings, H. Com. on Flood Control, 75th Cong., 3d Sess., p. 658). The Denison dam and reservoir will give substantial protection to these instrumentalities of commerce in the event of even the maximum probable flood, and will give correspondingly greater protection in the event of smaller floods.²¹

Moreover, the Red River is a boundary between Oklahoma and Texas. Traffic over the boundary is necessarily interstate. A flood on the river boundary would disrupt that traffic, thus immediately interfering with intercourse between the two states.

We think it plain that Congress has the power to prevent this threatened dislocation of interstate commerce by authorizing construction of the Denison flood-control project and thus striking at the root of the trouble. This Court has often held that Congressional authority over interstate commerce comprehends power to take all steps deemed neces-

²¹ The project as outlined in H. Doc. 541 would have protected 600,000 acres of cleared land in the event of the maximum probable flood (H. Doc. 541, p. 71); as modified by the Definite Project the protection will extend to 520,000 acres in the event of such a flood (Appendix D to Def. Proj., p. 2, *infra*, p. 107.).

sary or advisable to prevent obstruction or destruction of the arteries of commerce, whatever the source of the threatened injury. See *Gilman v. Philadelphia*, 3 Wall. 713, 725; *Second Employers' Liability Cases*, 223 U. S. 1, 47; *Arizona v. California*, 283 U. S. 423, 455-456; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288; *Virginian Ry. v. Federation*, 300 U. S. 515, 553; *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 37; *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 466. This established rule applies to obstruction and destruction caused by floods as well as to interference from other causes. In *Arizona v. California*, 283 U. S. 423, 453, 463, this Court upheld a dam project partially on the ground that it regularized stream flow and thus promoted navigability. Clearly, if such projects are valid when they conserve or improve one instrumentality of interstate commerce—navigable rivers—they are similarly valid when they prevent threatened destruction of other, equally important, instrumentalities of interstate commerce—railroads and highways, bridges, interstate pipe lines, telephone and telegraph lines, air fields, and the like.

A long line of cases supports the power of Congress to construct various types of instrumentalities necessary for commercial intercourse. As this Court stated in *California v. Pacific Railroad Co.*, 127 U. S. 1, 39:

The power to construct * * * national highways and bridges from State to

State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce.

Congress has exercised this power in aid of telephone and telegraph lines (*Pensacola Tel. Co. v. Western etc. Tel. Co.*, 96 U. S. 1, 11), railroads (*Pacific Railroad Removal Cases*, 115 U. S. 1, 18), highways (*Indiana v. United States*, 148 U. S. 148), and bridges (*Luxton v. North River Bridge Co.*, 153 U. S. 525). It seems entirely clear that if Congress has power to authorize construction of these various arteries of interstate transportation, it has the lesser power of protecting existing instrumentalities from destruction or disruption caused by floods. Cf. *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 463; *Virginian Ry. v. Federation*, 300 U. S. 515; *Second Employers' Liability Cases*, 223 U. S. 1.

III

THE ACT OF JUNE 28, 1938, IS A PROPER EXERCISE OF
THE POWER OF CONGRESS TO PROVIDE FOR THE GEN-
ERAL WELFARE

As shown in the preceding point, the Denison project, considered either from the standpoint of navigation or flood control, is a valid exercise of the power of Congress over interstate commerce. The court below did not find it necessary to go

further (R. 29). However, the legislative record demonstrates that when Congress authorized the construction of the dam and reservoir it did so because the project, in addition to benefiting commerce, would promote the general welfare. Accordingly, it is our position that the Denison project may be sustained under either (1) the commerce clause, (2) the general welfare clause, or (3) the commerce and general welfare clauses taken together.²²

It is settled that the general welfare clause of the Constitution grants to Congress power to authorize the expenditure of public moneys for the general welfare, and that the exercise of this power is not limited to the other enumerated powers. *Steward Machine Co. v. Davis*, 301 U. S. 548, 586-587; *Helvering v. Davis*, 301 U. S. 619, 640; see *United States v. Butler*, 297 U. S. 1, 65-66.

This Court has left no doubt that it is essentially for Congress and not the courts to determine what will promote the general welfare. Of all the great powers granted to Congress by the Constitution, few are as fully adapted to the widest Congres-

²² The validity of an act of Congress need not, of course, depend on any single clause of the Constitution. *Ashwander v. Valley Authority*, 297 U. S. 288, 327-330; *Norman v. B. & O. R. Co.*, 294 U. S. 240, 808; *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 681; *Juillard v. Greenman*, 110 U. S. 421, 439-440; *Legal Tender Cases*, 12 Wall. 457, 584.

sional discretion as is that to provide for the general welfare. Each expenditure for that purpose depletes the funds available for other methods by which to promote the general good; the legislative function is primarily that of choice among competing welfares. The exercise of the welfare power advances the national welfare at the expense of the Federal Treasury, not at the cost of private rights or freedoms. Each exercise of the power, then, is simply the choice by Congress of the expenditure best calculated to promote the national good and offers no threat to any individual interest which might be sufficient to invoke judicial protection against other types of legislation.

Mr. Justice Cardozo, in *Helvering v. Davis*, 301 U. S. 619, 640-641, explained why this field is so peculiarly committed to the judgment of Congress alone. He said:

The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. *The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.* This is now familiar law. "When such a contention comes here we naturally require a showing that by no reasonable possibility

can the challenged legislation fall within the wide range of discretion permitted to the Congress." *United States v. Butler*, *supra*, p. 67. * * * Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times. [Italics supplied.]

We are left, in this case, exceptionally free from doubt as to the decision of Congress that the project here in question is an appropriate exercise of the power to provide for the general welfare. In Section 1 of the Flood Control Act of June 22, 1936, c. 688, 49 Stat. 1570, authorizing the investigation and survey of flood-control projects, of which the Denison dam was one, Congress declared, with unusual explicitness:

It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities.

thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

There has accordingly been a deliberate and detailed decision by Congress that tributaries of navigable streams should be improved, by projects such as this, in order that the general welfare might be advanced.²² The succeeding pages will show that

²² The subsequent statutes contain nothing to the contrary. The Act of June 28, 1938 (*supra*, pp. 7-8) authorizes the Denison project "for the benefit of navigation and the control of destructive floodwaters and other purposes." The Act of October 17, 1940 (*supra*, pp. 8-9), declares that the project is "to be for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses." These declarations envisage benefits to the general welfare as well as interstate commerce. However, it should be noted that the Senate Committee had the following to say about the 1940 Act: "This section states that the Denison reservoir in Texas and Oklahoma previously authorized and now under construction, is authorized pursuant to the power vested in Congress under the commerce clause of the Constitution." Sen. Repts. Nos. 1876 (p. 4) and 2072 (p. 10), 76th Cong., 3d Sess. Cf. H. Rept. No. 2361 (p. 18) and Sen. Rept. 1365 (p. 71), 76th Cong., 3d Sess. But the

this decision cannot be said to be "clearly wrong," or "a display of arbitrary power." *Helvering v. Davis*, 301 U. S. 619, 640.

~~A. FLOOD CONTROL IN GENERAL IS AN EXERCISE OF THE POWER
TO PROVIDE FOR THE GENERAL WELFARE~~

It is unnecessary again to set before the Court the varied and extensive aid which Congress, through its appropriations, has offered to public health, education, industry, and agriculture.²⁴ It is sufficient here to note that federal relief of the distress which follows upon catastrophes has long been a settled policy.²⁵ Prominent among these oc-

1940 Act does not so state. At most the Committee report evidences the concern of Congress that benefits to interstate commerce should not be overlooked.

²⁴ For a comprehensive list of appropriation acts for such activities, the Court is respectfully referred to the Appendix to the Brief for the United States, Part C, pp. 61-69, in *United States v. Butler*, *supra*, No. 401, October Term, 1935.

²⁵ *Earthquakes*.—Venezuela, 1812 (Act of May 8, 1812, c. 79, 2 Stat. 730); New Madrid, Missouri, 1815 (Act of February 17, 1815, c. 45, 3 Stat. 211); Italy (Act of January 5, 1909, c. 7, 35 Stat. 584); and Japan, 1925 (Act of February 24, 1925, c. 297, 43 Stat. 963-964).

Indian Depredations.—Florida, 1836 (Public Res. No. 1, 5 Stat. 131); Minnesota in 1863 (Act of February 16, 1863, c. 37, 12 Stat. 652); and in general in 1834 (Act of June 30, 1834, c. 180, 6 Stat. 581); and 1860 (Act of May 9, 1860, c. 40, 12 Stat. 15).

Fires.—New York City, 1836 (Act of March 19, 1836, c. 42, 5 Stat. 6); Alexandria, Virginia, 1827 (Act of January 24, 1827, c. 3, 6 Stat. 356); Portland, Maine, 1866 (Public Res. No. 69, 14 Stat. 364); San Francisco, 1906 (Public Res. Nos. 16 and 19, 34 Stat. 827, 828); and Salem, Massachusetts, 1914 (Act of August 1, 1914, c. 223, 38 Stat. 609, 681).

Wars or Famines.—Ireland in 1880 (Public Res. No. 16, 21 Stat. 303); the Southern States in 1867 (Public Res. No.

casions are those when Congress has offered aid to the victims of floods. Ever since 1874, Congress has repeatedly appropriated funds for the relief of persons injured by the recurrent floods characteristic of many American rivers.²⁰ As this Court

-28, 15 Stat. 28); American citizens in Cuba in 1897 (Public Res. No. 11, 30 Stat. 220); India in 1897 (Public Res. Nos. 8 and 12, 30 Stat. 219, 220); Alaskan natives of the St. Paul and St. George Islands in 1897 (Act of June 4, 1897, c. 2, 30 Stat. 11, 29; Act of December 18, 1897, c. 2, 30 Stat. 226; Act of July 1, 1898, c. 546, 30 Stat. 597, 616); French West Indies in 1902 (Act of May 13, 1902, c. 787, 32 Stat. 198); Europe in 1919 (Act of February 25, 1919, c. 38, 40 Stat. 1161); and Russia in 1921 (Act of December 22, 1921, c. 15, 42 Stat. 351).

Tornadoes or Cyclones.—Mississippi in 1880 (Public Res. No. 30, 21 Stat. 306; and the Southern States generally in 1908 (Public Res. No. 20, 35 Stat. 572)).

Yellow Fever.—1879 (Act of April 18, 1879, c. 1, 21 Stat. 1); 1888 (Public Res. Nos. 44, 48, 25 Stat. 630, 631).

Cottonshopper Scourges.—1875 (Act of January 25, 1875, c. 25, 18 Stat. 303; Act of February 10, 1875, c. 40, 18 Stat. 314); 1877 (Act of March 3, 1877, c. 106, 19 Stat. 363, 374); and 1878 (Act of June 14, 1878, c. 191, 20 Stat. 115, 127).

²⁰ Mississippi River, 1874 (Act of April 23, 1874, c. 125, 18 Stat. 34; Act of May 13, 1874, c. 170, 18 Stat. 45; Act of June 23, 1874, c. 455, 18 Stat. 204, 230); 1882 (Act of April 11, 1882, c. 77, 22 Stat. 44; J. Res. Nos. 6, 9, 12, 16, 22 Stat. 378, 379); 1884 (Public Res. Nos. 18, 32, 23 Stat. 269, 273); 1890 (Act of March 31, 1890, c. 58, 26 Stat. 33; J. Res. No. 18, 26 Stat. 671); 1897 (Public Res. Nos. 3, 9, 30 Stat. 216, 219); 1912 (Public Res. No. 19, 37 Stat. 633); and 1913 (Act of October 22, 1913, c. 32, 38 Stat. 208, 211, 215, 216). Southern States generally in 1928 (Act of January 26, 1928, c. 11, 45 Stat. 53; Act of May 16, 1928, c. 572, 45 Stat. 539, 543; Act of June 13, 1929, c. 18, 46 Stat. 8). The Ohio River in 1884 (Public Res. Nos. 9, 12, 23 Stat. 267, 268). The Rio Grande River in 1897 (Public Res. No. 14, 30 Stat. 221).

said in *Steward Machine Co. v. Davis*, 301 U. S. 548, 586-587:

It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.

Congress has an unquestioned power to provide for the general welfare by appropriations for relief *after* the disaster. *A fortiori*, it has power by appropriation to *prevent* those disasters. It would be unthinkable that federal appropriations must be held unused while floodwaters destroy life and health, homes and industries, crops and

Kentucky, Vermont, and New Hampshire in 1928 (Act of May 16, 1928, c. 572, 45 Stat. 539, 570). Loans for seed, feed, and fertilizer to flood-stricken farmers in Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama in 1929 (Act of February 25, 1929, c. 318, 45 Stat. 1306). Rescue work in 1928 (Act of May 29, 1928, c. 853, 45 Stat. 853, 930) and in 1929 (Act of February 28, 1929, c. 366, 45 Stat. 1349, 1381).

From 1933 to 1936 loans amounting to approximately \$11,414,000 for rehabilitation after disasters and catastrophes such as floods, earthquakes, tornadoes, and fires were made by the Reconstruction Finance Corporation under authority of J. Res. No. 12, 48 Stat. 20; Act of April 13, 1934, c. 121, 48 Stat. 589; Act of April 17, 1936, c. 234, 49 Stat. 1232. From 1937 to the present, this activity has been continued by the Disaster Loan Corporation which has loaned approximately \$21,666,000 to sufferers from floods and other catastrophes under authority of the Act of February 11, 1937, c. 10, 50 Stat. 19; J. Res. No. 251, 50 Stat. 211; and the Act of March 3, 1938, c. 40, 52 Stat. 84.

roads, because they can come into play only after the harm has been done. The great clauses of the Constitution were not contrived to operate with any such caprice.

Congress, at least, has had no doubt as to the scope of its welfare powers. Since 1850 it has made expenditures for combined navigation and flood control (*supra*, p. 3) and since 1917 it has been engaged in the field of flood control alone, with only incidental attention to the improvement of navigation. See *Arizona v. California*, 283 U. S. 423, 458; *Act of March 1, 1917*, c. 144, 39 Stat. 948. Since 1917, appropriations of approximately \$1,455,926,000 have been authorized for flood-control projects and \$967,595,634 has actually been appropriated. This Congressional interpretation of its welfare powers should be given great weight. *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 327-328; *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 315.

The national interest in the control of floodwaters throughout the country, and, indeed, along any one of the nation's major rivers, is not open to question. For many years recurrent floods on the various rivers of the country have created a national problem of grave concern. It is estimated that the damage caused by these floods amounts to approximately \$100,000,000 per year;²⁷ in the years 1938

²⁷ Hearings before the Committee on Flood Control on H. R. 10618, 76th Cong., 3rd Sess., p. 23.

and 1939 alone, they caused damage of approximately \$148,900,000, resulted in the loss of 397 lives, and made necessary the evacuation of 15,200 families.²⁸ When these annual figures are translated into terms of damage caused by individual large floods, which occur only periodically, the gravity of the problem becomes clear. For example, the 1937 flood in the Ohio River Basin caused direct damage conservatively estimated at more than \$400,000,000. Water, electricity, and gas services were discontinued in many cities, highway and railway communications were severed, and business and industrial activities were completely disrupted for several weeks. More than 500,000 persons were driven from their homes.²⁹ Again, the damage in the Pittsburgh district during the 1936 flood amounted to approximately \$200,000,000.³⁰ The flood of March 1938 in the Los Angeles, San Gabriel, and Santa Ana Basins in California caused damage of \$100,000,000 and the loss of 87 lives.³¹ And the great flood of 1927 in the Mississippi River Basin resulted in a loss of 200 lives, rendered 700,000 homeless for about a month and caused

²⁸ Hearings before the House Committee on Flood Control on H. R. 6634, 76th Cong., 1st Sess., p. 6.

²⁹ H. Doc. No. 1, 75th Cong., 1st Sess., p. 3.

³⁰ Hearings before the House Committee on Flood Control on H. R. 7646, 75th Cong., 1st Sess., pp. 26-27.

³¹ Hearings before the House Committee on Flood Control on H. R. 6634, 76th Cong., 1st Sess., p. 6.

actual property damage estimated to be upward of \$200,000,000.²²

In addition to the direct damage and loss of life caused by floods, inestimable indirect damage and distress inevitably follow in their wake. Among the indirect effects may be noted the disruption of railway, highway, and telephone and telegraph communication, the threat to life and personal security in river communities, the personal suffering of flood refugees, the inconvenience resulting from the cessation of public utilities, the dislocation of industrial activity, the increase in sickness and loss of earning power, and the loss of livestock due to insect epidemics which always follow floods.²³

In the light of these facts and of the Congressional determination that they create a situation of national concern, it seems beyond question that the flood control expenditures authorized by Congress are for the welfare of the people, and that this welfare is general not particular, national not local. This is particularly true because of the inability of the several states to undertake an effective program of flood control. See *Helvering v. Davis*, *supra*, p. 644.²⁴

²² H. Doc. No. 90, 70th Cong., 1st Sess., p. 13.

²³ See Hearings before the House Committee on Flood Control on H. R. 7646, 75th Cong., 1st Sess., p. 80.

²⁴ The records of the War Department show that at the present time the Department has completed, or is in the process of constructing, 202 flood-control projects in various parts of the country, including such projects as reservoirs in the

The validity of flood-control projects has been questioned in two lower federal courts. In each case the constitutionality has been upheld. *In re United States*, 28 F. Supp. 758, 764 (W. D. N. Y.); *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.). In the latter case the court said (p. 320):

That flood control and the prevention of soil erosion are matters of public interest, national in scope, has been demonstrated through disasters affecting the whole nation. Great floods have been destructive of life, property, and soil over large areas. Dust storms have been steadily denuding one part of the continent through the damage, discomfort, and possible enrichment of the soil of other parts. Minor floods and local winds and rains are producing soil erosion, impoverishing the soil in every state and county in the nation. Soil conservation through prevention of erosion has become a national objective. Flood control has long been such.

We therefore think it beyond contest that the general flood-control program relates to the national welfare, and that this welfare is general, not

Connecticut River and Susquehanna River Basins, dams in the Ohio River Basin and in the Arkansas River Valley, levees in the Mississippi River Basin, and improvements at Los Angeles, and along the Columbia River and its tributaries in Washington and Oregon. Indeed, flood-control projects of one sort or another have been or are being constructed with federal funds in 37 states, and extensive surveys and investigations are in progress in all 48 states.

particular. There remains only the question whether the Denison reservoir was arbitrarily included by Congress in the general program of flood control.

B. THE DENISON PROJECT PROVIDES FOR THE GENERAL WELFARE

As has been pointed out (pp. 3-9), the Denison project is a part of a comprehensive national program of flood control. Before approving it, Congress made a long and intensive investigation. No less than four exhaustive reports were made during the period 1930-1938 following surveys and investigations made by the Corps of Engineers of the United States Army, with the assistance of the Federal Power Commission. See H. Doc. 541, at pp. 13-14. Following these reports, extensive hearings were held before the House Committee on Flood Control, 75th Cong., 3d Sess. (1938), pp. 605-686; and before both the House and Senate Subcommittees on Appropriations, 76th Cong., 1st Sess., considering the War Department Civil Functions Bill for 1940 (House Hearings, pp. 383-443; Senate Hearings, pp. 13-148, 213-217). The resulting appropriation obviously cannot be condemned as "not an exercise of judgment." *Helvering v. Davis*, 301 U. S. 619, 640. Equally clear is the conclusion that the judgment was properly exercised.

The Denison reservoir is designed primarily to control floods on the Red River. The maximum probable flood on this river is considerably in excess of any that has yet occurred. But even the

past floods have inundated as much as 560,000 acres of cleared, agricultural lands and the maximum probable flood would cover 920,000 acres of such land (H. Doc. 541, pp. 4, 27-28, 70-71). Under the final specifications, the Denison project will fully regulate all floods of the size of any flood of record, including that of 1908, and approximately 520,000 acres of cultivated lands in four states would be protected even in the event of the maximum probable flood (Appendix D to Def. Proj., p. 2, *infra*, p. 107). Moreover, the reduction of flood hazards would result in an increase in agricultural pursuits, since the large acreage now lying dormant would be thrown into agricultural use (Appendix D to Def. Proj., p. 7, *infra*, pp. 108-109; H. Doc. 541, p. 70).

It is estimated that the *annual* benefits resulting from the flood protection afforded by the Denison project will total \$1,613,080.00 (Appendix D to Def. Proj. p. 3, *infra* p. 108; cf. Appendix H, H Doc. 541, *infra* p. 96). The largest single item going to make up this total is the annual benefit to crops. Flood damages to crops are now so extensive that they constitute a major economic problem to landowners, tenants, and sharecroppers (H. Doc. 541, p. 29). In addition, substantial annual benefits are assignable to the protection of livestock, farm machinery, business and residential buildings, factories, streets, sewers, highways, bridges, railroads, ferries, and telephone and power lines (Appendix H, H. Doc. 541, *infra* p. 96).

Also significant, although of such a nature that it cannot be assigned a monetary value, is the effect of the Denison reservoir in guarding against a coincidence of Red River floods with those on the Mississippi River. The Court at the last Term examined the elaborate and extensive plan for the control of Mississippi River floods. See Supplemental Brief for petitioner, *United States v. Sponenbarger*, No. 72, October Term 1939. It is beyond question desirable that there be means of holding back flood waters of the Red River which might otherwise be added to the Mississippi flood, with disastrous consequences to the lower Mississippi Delta (See H. Doc. 541, p. 86 and Appendix D to Def. Proj., p. 7, *infra* p. 109).

In addition to affording this protection, the construction of the project will provide work for relief of the unemployed "in the seriously depressed areas in the vicinity of the reservoir" and will prevent "losses to agricultural employment, industry, and transportation when flood losses greatly reduce the cotton yield." Again, the development of power will provide a considerable stimulus to the industrial development of the surrounding area, and give it a needed diversification of employment. It will make possible the "retirement of large tracts of submarginal lands in the reservoir area with possibility of resettlement in downstream tracts now wooded or uncultivated due to annual flood hazard." It will be of "considerable benefit

for malaria control" which has been "a serious health problem for many years" (H. Doc. 541, pp. 39-40, 69, 77).

No less important to the general welfare, the project will be of value in regulating the stream flow for water supply, dilution of sewage, and prevention of pollution. The huge reservoir will afford recreational facilities and a sanctuary for wildlife; it will make available a large supply of electric power "in time of war or during other power emergencies of national or local extent." Finally, the project will be the means for the "prevention of possible loss of lives if and when a flood of the magnitude indicated as probable occurs" (H. Doc. 541, p. 77).

There is accordingly a wealth of evidence to support the judgment of Congress that construction of the Denison reservoir will provide for the general welfare. "The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train." *Steward Machine Co. v. Davis*, 301 U. S. 548, 587.

There can, of course, be no contention that the Denison reservoir does not provide for the general welfare because its benefits are confined to the four states protected and served by the project. The Denison reservoir is an integral part of the whole Mississippi River flood-control plan, offering protection to the inhabitants of the entire

valley, and is an element in the national program of flood control reaching throughout the country (*supra*, pp. 3-9). As was said in *Greenwood County v. Duke Power Co.*, 81 F. 2d 986, 994 (C. C. A. 4):

* * * No matter how clearly national the end to be attained by expenditures under the general welfare clause, or how appropriate the means adopted for the attainment of that end, each individual expenditure must needs have a local as well as a national character; for money cannot be expended in vacuo, and no project can be imagined, even though part of a national program, which will not have a local situs.

* * *

There can be no general welfare which is not an aggregation of local welfares: the nation is not a metaphysical abstraction but the sum of its citizens.

O. THE WELFARE CLAUSE AUTHORIZES ACQUISITION AND CONSTRUCTION AS WELL AS EXPENDITURE

The Denison dam and reservoir, as we have shown, is an unassailable object of expenditure under the welfare clause. There remains only the question whether there is anything in the method by which the purpose is to be accomplished that removes the project from the authority granted by the welfare clause.

Appellant concedes (Br. 54) that Congress may tax and spend for the general welfare but asserts that the welfare clause is not a "substantive grant

of authority" to Congress. The precise nature of this contention is not clear, particularly since this Court has characterized the power to tax and appropriate for the general welfare as "a substantive power" and has said that it is "separate and distinct from those later enumerated." *United States v. Butler*, 297 U. S. 1, 65-66. If appellant means that the welfare clause gives Congress no general power to regulate for the promotion of the general welfare, its contention is irrelevant because, in authorizing the Denison Project, Congress did not attempt to regulate, interfere with, or control any matter reserved to the states. Cf. *United States v. Butler*, 297 U. S. 1, 68; *Carter v. Carter Coal Co.*, 298 U. S. 238, 289-292.

However, it may be that appellant contends that the power to spend embraces only the disbursement of federal funds and does not include the power to acquire or construct property to be devoted to the general welfare. Any such objection is patently untenable. The United States could make only halting provision for the general welfare if it could not receive anything for the funds which it expended. Indeed, it is impossible even to make pure expenditures without the acquisition or construction of property, such as bookkeeping apparatus, furniture, buildings, and land.

To read the broad authority of the welfare clause as limited simply to expenditure, divorced from the acquisition or construction of property by which

provision for the general welfare might be made effective, would import into the Constitution a self-defeating nicety, justified by neither the language nor the purpose of the clause. Certainly this Court would give short shrift to any contention that the power to "lay and collect taxes * * * and provide for the common defence" is restricted to the power to spend money for the common defense and does not include the power to acquire property, equipment, and ordnance of all types necessary for the effective operation of the military and naval forces of the nation. The "general welfare" clause is a cognate provision to the "common defence" clause and is, of course, to be similarly construed.

In this connection it should be noted that the Circuit Court of Appeals for the Sixth Circuit has recently sustained under the general welfare clause the right of the Federal Government to acquire land in Ohio for the construction of a model housing community which was designed to provide homes for some 732 families and to furnish work for the unemployed in a time of economic stress. *Bastian v. United States*, C. C. A. 6, No. 8433, decided April 8, 1941.¹⁵

¹⁵ Two earlier decisions to the contrary, *Franklin Township v. Tugwell*, 85 F. 2d 208 (App. D. C.) and *United States v. Certain Lands in City of Louisville*, 78 F. 2d 684 (C. C. A. 6), certiorari granted, 296 U. S. 567, dismissed on motion of petitioner, 297 U. S. 726, seem now to be definitely discredited. They have been severely criticized and appear to

Nor does the fact that acquisition of land through eminent domain is contemplated affect the validity of the Denison Project under the general-welfare clause. It is well established that the United States, as an incident of its sovereignty within the field of its delegated powers, possesses the power of eminent domain and may use that power to acquire land whenever it is necessary or appropriate to do so in the exercise of any of the powers granted by the Constitution.— *Kohl v. United States*, 91 U. S. 367, 371; *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 656; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529–530; *Chappell v. United States*, 160 U. S. 499, 509–510; *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 679.

The power of eminent domain finds its most explicit source in the concluding clause of Section 8 of Article I, which grants all powers necessary and proper to carry into execution the “foregoing powers.” The power to tax and to spend is clearly one of the “foregoing powers.” There can, there-

be inconsistent with the decisions of this Court in the *Butler* and *Social Security* cases, *supra*. See Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. Pa. L. Rev. 131; (1937) 50 Harv. L. Rev. 802, 805–813; (1935) 35 Col. L. Rev. 284–285; (1935) 33 Mich. L. Rev. 957–960; (1935) 11 Wis. L. Rev. 118–115; (1936) 18 N. Y. U. L. Q. Rep. 285–287. See also Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 Boston U. L. R. 615, 637 (1940); Nicholson, *Recent Decisions on the Power to Spend*, 12 Temple L. Q., 435, 458 (1938).

fore, be no doubt that as a matter of constitutional construction the power of eminent domain attaches to activities under the welfare clause equally with those under the other powers enumerated in Section 8.

The answer is equally clear if the question be phrased in terms of the practical requirements of government. This Court has long since set out the considerations of expediency and policy which make imperative the power of eminent domain. It said, in *Kohl v. United States*, 91 U. S. 367, 371-372:

Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. * * * * If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. * * * The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.

All of these considerations apply with equal force to the exercise of the power to condemn as used to effectuate the taxing and spending power. One of the most important attributes of the power to spend is the power to acquire property and, as this Court suggested in *Koht v. United States*, 91 U. S. 367, 371, this latter power "may be rendered nugatory" if the government does not possess the power of eminent domain. Thus, the construction of public works often requires the acquisition of large areas consisting of numerous separately owned parcels of real estate. This is particularly true of reservoirs for flood-control projects. If voluntary purchase is the only method of acquisition open to the United States, one landowner may block an entire project. The absence of the right of eminent domain would leave the government only the choice of paying whatever price the landowner might fix, no matter how exorbitant, or of abandoning the project.^{**} Furthermore, in many cases acquisition by eminent domain is the only practicable method which will give the United States clear and certain title.

If it be that the decisions of this Court have not settled the question beyond the possibility of dis-

^{**} There would seem to be no warrant for proceeding without prior acquisition of the land and leaving the landowner to bring suit for just compensation on an implied contract or under the Fifth Amendment. That type of taking is permissible and suit is possible, only when there is power in the Government to condemn.

pute, they do point with unmistakable clarity to the conclusion we urge. No case has intimated that eminent domain could not be used in exercise of the welfare powers. On the contrary, a number have indicated that the power of eminent domain attaches to all federal powers.

In *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, this Court said that the United States could exercise the power of eminent domain "whenever it becomes necessary, for the accomplishment of any object within the authority of Congress." Again, in *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 657, this Court declared that property could be taken by the United States "for such objects as are germane to the execution of the powers granted to it."

More directly in point is *United States v. Gettysburg Electric R'y*, 160 U. S. 668. There this Court appears definitely to have taken the view that the power to tax and spend carries with it the power of eminent domain. In that case the question was whether the United States could condemn land at Gettysburg, Pennsylvania, for the purpose of preserving the battlefield and marking the positions occupied by different bodies of troops in such a way as to assist the study and correct understanding of the battle. This Court upheld the power of the United States to condemn land for those purposes. It said (p. 681):

And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. *It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect.* [Italics supplied.]

It is doubtless true that in the *Gettysburg* case the Court did not rely exclusively on the power of Congress to levy taxes and appropriate the proceeds to provide for the general welfare, but relied in part upon the war power or an aggregate of powers. But it is equally true that the Court definitely linked the power of eminent domain with the taxing and spending power. The decision was so understood in *Roe v. Kansas*, 278 U. S. 191, 193. In any event, the *Gettysburg* case is entirely opposite to the present one, since here the Government also relies upon the exercise of an aggregate of powers—the power to spend for the general welfare and the commerce power.

Our conclusion also finds ample support in the decisions of lower federal courts. *Oklahoma City v. Sanders*, 94 F. 2d 323, 327 (C. C. A. 10); *In re United States*, 28 F. Supp. 758, 762-765 (W. D., N. Y.); *United States v. Eighty Acres of Land*, 26 F. Supp. 315, 320-322 (E. D., Ill.). See also *United States v. Dieckmann*, 101 F. 2d 421, 424 (C. C. A. 7); *United States v. 546.03 Acres*, 22 F. Supp. 775 (W. D., Pa.). Cf. *Bastian v. United States*, C. C. A. 6, No. 8433, decided April 8, 1941.

It is not true, as appellant suggests (Br. 54), that if the general welfare clause be construed to confer upon Congress power to authorize construction of the Denison Project, "the power of Congress is unlimited and the remainder of the Constitution is largely surplusage." The power to expend money is necessarily only one of the powers of government and, indeed, because of the absence of sanctions and the practical limitations upon the money available for expenditure, it is one of the most restricted powers; the principal power of any government is the power to regulate. Recognition that Congress may expend money for any purpose which it deems to be in the public interest neither detracts from the need for its power to regulate nor places a restriction upon the field reserved for state regulation. Within its field of operation, the only restriction upon the power to spend may be the requirement that the object of the expenditure promote the "general welfare." The important

consideration, however, is that the field in which the power operates is in providing for the general welfare *through the expenditure of money*. Even though there is no very definite limit upon the operation of this power within its field, the scope of that field insures that the general welfare power is in no way inconsistent with, or in derogation of, the constitutional division of regulatory functions between state and nation.

IV

THE TENTH AMENDMENT IS NOT VIOLATED

The complaint (R. 12) and appellant's brief (pp. 55-58) place an undefined reliance upon the Tenth Amendment. It is argued that (1) the appellant will lose jurisdiction over the lands taken, (2) its political subdivisions will be deprived of the right to tax those lands, (3) 40 miles of its boundary will be obliterated, and (4) the project will conflict with its water conservation program.

We have shown that the Denison project constitutes an exercise of the powers granted Congress to regulate interstate commerce and to spend in aid of the general welfare. This completely disposes of the contention that the Tenth Amendment is violated. *United States v. F. W. Darby Lumber Co. et al.* No. 82 this Term, decided February 3, 1941; *Opp Cotton Mills, Inc. v. Wage and Hour Div. Dept. Labor*, No. 330 this Term, decided Feb-

ruary 3, 1941; *United States v. Appalachian Power Co.*, 311 U. S. 377, 428-429.

Moreover, it being conceded (R. 26) that if the Act in question is constitutional the United States may acquire all the necessary lands by condemnation proceedings,¹¹ none of the alleged injuries of which the appellant complains has any bearing upon the validity of the project.

1. It is to be noted at the outset that there will be no loss of political jurisdiction over the lands taken except with the consent of the State. Article I, section 8, clause 17 of the Constitution.

2. The next objection is in effect that the State prefers the lands to remain in private ownership, in order that the tax revenues of its subdivisions will not be reduced. But there is no charge that any property owner will not receive just compensation, and the single purpose of the Fifth Amendment of the Constitution is to leave whole a dispossessed property owner. The possible effect upon tax revenues of substituting just compensation for real property is a matter inherent in any eminent-

¹¹ The specific concession that the federal government has full power to condemn land owned by the State is in accord with well-settled authority. *Wayne County v. United States*, 53 C. Cls. 417, affirmed 252 U. S. 574; cf. *Town of Bedford v. United States*, 23 F. (2d) 453 (C. C. A. 1); *United States v. Gettysburg Electric R'y*, 160 U. S. 668, 685; *Monongahela Bridge v. United States*, 216 U. S. 177; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J.); see 1 Nichols, *Eminent Domain* (2d ed., 1917), p. 113; *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 656.

domain proceeding. In *Florida v. Mellon*, 273 U. S. 12, 17, this Court rejected the contention that a state could halt the exercise of a federal power by pointing to a diminution of its tax revenues, saying:

If the act interferes with the exercise by the state of its full powers of taxation or has the effect of removing property from its reach which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution, and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield. *Ex parte Virginia*, 100 U. S. 339, 346; *Brown v. Walker*, 161 U. S. 591, 606; *Cummings v. Chicago*, 188 U. S. 410, 428; *Lane County v. Oregon*, 7 Wall. 71, 77.

3. The so-called "obliteration" of the State's boundary, of course, adds nothing. It would be a novel doctrine which permitted the federal government to take any necessary land by eminent domain except that which chanced to lie along a State boundary.

4. Appendix 3 to appellant's brief (pp. 84-87) sets out the statutory scheme by which the water resources of the State are to be conserved and developed. It appears that the proposed dam is not

deemed an interference because of any engineering effect of the project, but simply because it has not been authorized by the Oklahoma Planning and Resources Board. (See Br. 56-57; complaint, R. 11.)

It is, however, settled that the State cannot complain merely of a disregard of its water program. *New Jersey v. Sargent*, 269 U. S. 328, 338; *Arizona v. California*, 298 U. S. 558, 566, 568. And even if an actual conflict of federal and state water programs were alleged, that of the State must fall before the legislation of the United States. This has long been settled with respect to the federal power over navigable waters, *New Jersey v. Sargent*, *supra*, 337, and cases cited, and as to federal power over nonnavigable streams when exercised in aid of downstream navigation, *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 703-704, 708. It has been shown that this is such a project. And, by precise parity of reasoning, the same result must follow if the project be viewed as undertaken under the welfare clause alone.

CONCLUSION

The Flood Control Act of June 28, 1938, insofar as it provides for the construction of the Denison Dam and Reservoir, is clearly constitutional either as an exercise of the power of Congress to legislate for the benefit of navigation and the protection of interstate commerce or to spend public funds for

the promotion of the general welfare. Accordingly, the acts of the appellees pursuant to its terms do not give rise to a cause of action.

It is, therefore, respectfully submitted that the judgment of the district court denying the injunction and dismissing the complaint should be affirmed.

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APRIL 1941.

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APPENDIX A

STATUTORY PROVISIONS

The pertinent provisions of the Act of June 22, 1936, C. 688, 49 Stat. 1570, are as follows:

SECTION 1. It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

SEC. 2. That, hereafter, Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of

and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and waterflow retardation and soil erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress; and that in their reports upon examinations and surveys, the Secretary of War and the Secretary of Agriculture shall be guided as to flood-control measures by the principles set forth in section 1 in the determination of the Federal interests involved: *Provided*, That the foregoing grants of authority shall not interfere with investigations and river improvements incident to reclamation projects that may now be in progress or may be hereafter undertaken by the Bureau of Reclamation of the Interior Department pursuant to any general or specific authorization of law.

SEC. 7. The Secretary of War is hereby authorized and directed to continue surveys, studies, and reports at the following-named localities, where, according to the surveys and estimates already made, opportunities appear to exist for useful flood-control operations with economical development of hydroelectric power whenever sufficient markets to absorb such power become available, the cost of these surveys to be paid from appropriations heretofore or hereafter made under the authorization in this Act or subsequent similar Acts:

Denison Reservoir, Texas.

SEC. 9. The sum of \$310,000,000 is authorized to be appropriated for carrying out the improvements herein and the sum of \$10,000,000 is authorized to be appropriated and expended in equal amounts by the Departments of War and Agriculture for carrying out any examinations and surveys provided for in this Act and other Acts of Congress: *Provided*, That not more than \$50,000,000 of such sum shall be expended during the fiscal year ending June 30, 1937: *Provided further*, That for the relief of unemployment, in addition to the regular appropriation, persons may be employed on such works of improvement and the compensation of said persons when so employed shall be paid from the funds available to the Works Progress Administration for the continuance of relief and work relief on useful projects.

Pertinent provisions of the Act of June 28, 1938, c. 795, 52 Stat. 1215, are as follows:

SEC. 4. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports herein-after designated: *Provided*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation

of the Chief of Engineers and of the Federal Power Commission.

The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000 . * * *

The Government of the United States acknowledges the right of the States of Oklahoma and Texas to continue to exercise all existing proprietary or other rights of supervision of and jurisdiction over the waters of all tributaries of Red River within their borders above Denison Dam site and above said dam, if and when constructed, in the same manner and to the same extent as is now or may hereafter be provided by the laws of said States, respectively, and all of said laws as they now exist or as same may be hereafter amended or enacted and all rights thereunder, including the rights to impound or authorize the retardation or impounding thereof for flood control above the said Denison Dam and to divert the same for municipal purposes, domestic uses, and for irrigation, power generation, and other beneficial uses, shall be and remain unaffected by or as a result hereof. All such rights are hereby saved and reserved for and to the said States and the people and the municipalities thereof, and the impounding of any such waters for any and all beneficial uses by said States or under their authority may be as

freely done after the passage hereof as the same may now be done.

SEC. 9. That the sum of \$375,000,000 is hereby authorized to be appropriated for carrying out the improvements herein over the five-year period ending June 30, 1944, and the sum of \$10,000,000 additional is authorized to be appropriated and expended in equal amounts by the Departments of War and Agriculture for carrying out any examinations and surveys provided for in this Act and any other Acts of Congress, to be prosecuted by said Departments. The sum of \$1,500,000 additional is authorized to be appropriated and expended by the Federal Power Commission for carrying out any examinations and surveys provided for in this Act or any other Acts of Congress, to be prosecuted by the said Federal Power Commission.

Pertinent provisions of the Act of October 17, 1940, Public, No. 868, c. 895, 76th Cong., 3rd Sess., are as follows:

SEC. 4. The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses.

18

~~and has assumed a somewhat more definite character.~~

APPENDIX B

APPENDIX H TO HOUSE DOCUMENT 541

The pertinent portions of Appendix H, referred to but not printed in House Document No. 541, are as follows:

III. FLOOD DAMAGE

1. Introduction.—The principal loss caused by floods in the Red River Valley is that to crops. The usual flood occurs late enough in the season to prevent a new crop of cotton from maturing and for other crops, on the average, not more than half a crop can be harvested after a flood. Some loss of this kind as well as bank caving and various intangible losses occur even with minor floods. If the so called "project" flood or maximum probable flood were to occur under present conditions the loss would be enormous. Bridges would be washed out, levee districts and towns inundated, and much property damage done. The following paragraphs describe the estimates of the monetary value of these losses.

2. Crop losses.—In determining the average crop production per acre, actual figures were obtained from the County Agents of Lamar, Red River, and Bowie Counties, Texas McCurtain County, Oklahoma and Little River and Miller Counties, Arkansas. The figures were compiled from representative farms in each county and pertained only to land lying in the alluvial valley. In addition to these statistics, numerous representative farmers

operating in Texas, Oklahoma, Arkansas, and Louisiana, were interviewed and figures were obtained which showed the actual production. These records showed the average production to be as follows:

Cotton-200 pounds per acre above Index.

Cotton-250 pounds per acre below Index.

Corn-30 bushels per acre, entire valley.

Mixed hay-1 ton per acre, entire valley.

Vegetables-variable.

As it was impracticable to use every individual item in compiling this estimate, only the major crops were considered, and only two headings were used for them, namely: "Cotton" and "Other Crops." However, as "Cotton Seed" represented a major item by itself, there being approximately one-half ton of seed to a bale of cotton, it was decided to assign it a separate heading.

Crop acreage figures, furnished by the various County Agents in the three states affected, indicate that 60 per cent of the cultivated area between Denison and Index is normally planted in cotton, the remaining 40 per cent being in other crops. For the area between Index and Alexandria the percentages are 70 per cent and 30 per cent respectively. This additional 10 per cent in cotton crop for the lower valley is explained by the fact that the levees offer protection which makes an increase in the major crop profitable.

The price used for cotton was arrived at thus: After the war, cotton was selling for around fifteen to eighteen cents per pound. However, during the depression years, cotton sold as low as four and five cents per pound. As neither the high nor low prices were representative of normal years, a

price of thirteen cents per pound was assumed to be a fair figure.

As the five to six-dollar per bale cost of ginning was not included in the charges against cotton production, and as the farmer usually pays the ginner for the cost of ginning with cotton seed, this expense was deducted from the seed value.

In 1936, cotton seed sold for thirty-four to thirty-five dollars per ton. In March 1937 it was selling for forty dollars per ton, but during depression years it sold at a much lower price. Thirty-two dollars per ton was selected as a conservative figure.

As the ratio of cotton seed to lint is 2 to 1, a 500 pound bale of cotton will produce 1,000 pounds of seed or $\frac{1}{2}$ ton.

One-half ton of seed at \$32 less \$6 for ginning equals \$10, which is the net value used for the seed from one bale of cotton. This is equivalent to \$20 per ton of seed. The value of "Other Crops" per acre was determined as follows:

89 per cent of area in corn, wheat, oats, and rye, @ \$25 per acre	\$20.00
1 per cent of area in vegetables, @ \$100 per acre	1.00
4 per cent of area in alfalfa @ \$80 per acre	3.20
15 per cent of area in mixed hay @ \$12 per acre	1.80
Total average per ac. "Other Crops"	26.00

As only one-half of the crop was assumed to be lost, one-half of \$26, or \$13 per acre, was used.

Actual records at Denison cover a period of 30 years, 1906-1936, inclusive. During this period three floods occurred that would cause damage; namely: 1908, 1915, and 1935. As the 1915 flood had several peaks and a study of damage attributed to flow above Denison was very difficult to determine, it was assumed that it caused a damage equal to

that of 1935. Therefore, the annual damage by floods for the period of record was 1908 damage plus 1935 damage times two divided by 30.

The loss caused by the Project Flood assumed to occur once in the economic life of the Project, or once in fifty years, was divided by fifty in order to determine the annual loss.

The greater portion of the uncultivated area in the valley is used, almost exclusively, for pasturage. When inundated by floodwaters the timber is not damaged, but the grass is covered with silt, making it necessary to feed the livestock for an indefinite period; low places are left full of water, which at times require months to dry up; and large quantities of drift are deposited which must be cleaned up. It is difficult to place an exact amount on these damages, but the various studies indicate that annual benefit of 4 cents per acre is a fair figure.

A summary of the computations of average annual crop loss is given in Table No. 1.

3. Flood damage other than crops.—The project flood is of such nature and size that if it is allowed to go down the river uncontrolled it will cause enormous damage to all that lies in its path. The 1908 flood uncontrolled would also cause damage, but to a much lesser degree since many structures and improvements have been built with the 1908 high water elevations as a guide.

The following flood damage figures are in most cases only for the Project Flood which was considered to occur once in 50 years. Where similar damage to a lesser degree occurs for the other floods studied it is incorporated and the amount noted as such.

4. Business buildings (buildings and merchandise).—The business section of Alexandria would be covered by seventeen feet of water and it is located so that there would be a strong current through it. Also a number of small towns would be inundated. The probable loss to buildings and merchandise was estimated at \$1,200,000.

~~Annual~~ ~~loss~~ ~~and~~ ~~amount~~ ~~in~~ ~~inundation~~ ~~per~~ ~~year~~ ~~\$24,000~~

5. Residence buildings (buildings and contents).—This loss was divided into city and rural sections as noted below.

Cities

Shreveport, 50% inundated.	40,000
Alexandria, 100% inundated.	24,000
Fulton, Garland, Coushatta, Bossier City, Colfax, and other small towns inundated.	16,000

Population

Shreveport, 50%	40,000
Alexandria	24,000
Other small towns	16,000
	<u>80,000</u>

$80,000 \div 5 = 16,000$ homes at \$125 damage to building and
\$75 damage to furniture \$3,200,000

Barksdale Field, Louisiana 100,000

Farms:

580,000 acres, one building to 40 acres, 14,000 buildings at \$50	700,000
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Annual	4,000,000
	<u>80,000</u>

6. Factories and municipal plants.—Shreveport has a number of manufacturing plants that would come within the area flooded. Lumberyards and mills would be inundated at Alexandria. Damage to buildings, equipment, and materials was estimated at \$1,000,000. Annual \$20,000.

One-half the streets of Shreveport, all of the streets of Alexandria, and a number of small towns

along the river would be inundated. No damage was estimated for streets other than pavement. It was estimated that 90 miles of pavement would be damaged in the amount of \$5,000 per mile or a total of \$450,000. Annual \$9,000.

7. Sewers.—Sewer systems in Shreveport, Alexandria, and Bossier City would be affected by the high water. The amount of damage was placed at \$150,000. Annual \$3,000.

8. Highways.—Between Fulton, Arkansas, and Alexandria, Louisiana, there is approximately 500 miles of paved or improved road that parallels or is adjacent to the Red River and is subject to overflow. Also there is approximately 12 miles of pavement crossing the alluvial valley at Fulton, Garland, and Shreveport. This pavement would be subject to rather heavy damage.

Fulton to Alexandria, 300 miles at \$2,500	\$750,000
Crossings at Fulton, Garland, and Shreveport, 12 miles at \$10,000	120,000
Total	\$870,000
Annual	17,400

TABLE No. 1.—Average annual crop damage prevented by reservoir on Red River at Denison, Tex.

Flood Designation	Peak Discharge at Denison c.f.s.	Above Index			Below Index			Denison- Alexandria
		Cleared Area Flooded	Total Value of Protection	Cleared Area Protected	Cleared Area Flooded	Total Value of Protection		
Project								
Natural	1,744,000	261,468			628,748			
Modified	310,000	145,168	110,380	\$2,150,075	172,360	484,188	\$14,582,684	417,22,770
1908								
Natural	471,000	231,468			826,305			
Modified	45,000	14,316	216,180	4,062,124	147,440	175,913	5,384,220	10,485,319
1916								
Natural	186,000	152,168			172,360			
Modified	55,000	15,316	127,867	3,108,050	157,360	25,100	1,058,385	4,208,318

Annual crop damage	Average crop value per acre	Average crop value per acre
Project Flood:		
Total damage.....	\$17,222,770	
Annual damage $\frac{1}{10}$	\$1,722,270	
Damages in 30 Years:		
100%		
1925 \times 9		
Total.....	\$18,007,000	
Annual $\frac{1}{10}$	\$1,800,700	
Wooded land, 70,300 acres, @ 4	28,114	
Total annual crop damage.....	\$1,007,516	

70% of area in cotton:	
200 @ 13¢	\$21.76
Cottonseed 50 acres.....	3.40
40% of area in other crops:	
50¢ per acre & 50% loss.....	1.90
Average crop value per acre.....	\$0.15

9. Bridges.—Costs of construction of the bridges were used where available. In other cases weights of material in bridges were computed or estimated and the value of the bridge found by arriving at a unit price per foot of length of bridge.

Approaches to the bridges include embankment and pavement or track subject to overflow by project flood. It was assumed all bridges down to and including Index, Arkansas, would be destroyed.

Highway bridges:

Denison	\$200,000
Sowells Bluff (under construction)	\$300,000
Arthur City	\$120,000
Index	\$180,000
	\$800,000

Toll bridges at Telephone and Denison, Texas, including approaches

Highway approaches, four @ \$40,000

Railroad bridges:

Denison, M. K. T.	1,081 feet
Carpenters Bluff, K. O. & G.	1,100 "
Arthur City, Frisco	858 "
Index, K. C. S.	1,200 "

4,189 feet at \$187

Railroad approaches, four @ \$30,000

Miscellaneous:

Cost of temporary structures, railroad

Cost of temporary structures, highway

Annual

\$2,383,000

\$47,680

10. Railroads.—The railroads would have heavy damage to track in the lower valley in addition to loss of bridges. A number of cars placed on bridges to weight them down would be lost, also freight in cars standing in yards would be damaged. This damage was estimated as follows:

Track adjacent to river, 250 miles @ \$5,000

\$1,250,000

Cars lost with bridges, 200 @ \$5,000

1,000,000

Loss to freight in yards, 200 @ 1,000,000 lbs. capacity, 5¢ lb., or \$5,000 per car.	\$1,000,000
Total	8,250,000
Annual	65,000

11. *Farm Machinery.*—River water covering farm machinery would cause material damage, especially equipment such as tractors, motors, etc.

Tractors, approximately 1 to 1,000 acres—500 @ \$50.	\$25,000
Machinery (mowing machines, binders, etc.)	5,000
Miscellaneous (pumps, lighting units, etc.)	20,000
Total	50,000
Annual	1,000

12. *Livestock.*—The project flood is of such magnitude that the majority of high points in the valley where stock would naturally be gathered would be completely inundated. As this flood would come with very little warning, time would not permit the removal of this stock to safety. The 1908 Hypothetical Flood, in all probability, would not create such an enormous loss to livestock as the majority would be able to reach the various islands left in the overflow. The Project Flood, therefore, is the only one being considered.

Mules and horses (approximately 20,000 in the valley):	
1,500 lost @ \$100 each	\$150,000
Cattle (approximately 50,000 in the valley): 10,000 lost @	
\$40 each	400,000
Hogs (approximately 15,000 in the valley): 8,000 lost @	
\$5 each	15,000
Sheep and goats (approximately 15,000 in the valley):	
8,000 lost @ \$4 each	12,000
Chickens and turkeys (approximately 210,000 in the valley):	
105,000 lost @ 50¢ each	52,500
Total	625,500
Annual	12,500

13. *Relief (care of destitute).*—With the loss and destruction of practically the entire crop in the

valley, an enormous number of farm tenants would be made entirely destitute. As the tenant population is composed almost entirely of negro and poor white classification, they would, of a necessity, have to be placed on relief.

10,000 families for six months @ \$10 per month	\$600,000
Annual	12,000

14. *Ginning losses.*—The average cost of ginning was assumed to be \$6 per bale. This loss is directly chargeable against the flood because a loss of cotton means a corresponding loss to the ginner, for, had the cotton crop been made, he would have ginned it. The actual cost of fuel and damage to machinery, from ginning, was assumed to be \$1.50. This amount deducted from \$6.00 represents the anticipated loss per bale, or \$4.50.

Project Flood, 201,057 bales @ \$4.50	\$905,757
Annual	18,000
30-year damages, 200,621 bales @ \$4.50	902,795
Annual	30,000

15. *Loss to railroad companies (hauling cotton).*—The various railroad companies operating in the vicinity of the Red River valley anticipate a certain volume of business, each year, from this area, and consequently maintain the necessary facilities for handling it. In the event of a major flood, the crops are destroyed and the railroad loses the entire transportation. As Texarkana, Texas-Arkansas, is located approximately midway between Denison and Alexandria, it was assumed that the freight rate from there to the various destinations, particularly New Orleans, Louisiana, or Galveston, Texas, would be representative.

Project Flood:

Cotton, 201,057 bales at \$1.55 per bale.....	\$311,638
Cottonseed, 100,529 tons at \$7.20 per ton.....	723,809
Total.....	1,035,447
Annual.....	20,709

30-year damages,

Cotton, 200,021 bales at \$1.55 per bale.....	310,988
Cottonseed, 100,811 tons at \$7.20 per ton.....	722,289
Total.....	1,033,202
Annual.....	34,440

16. Loss to railroad companies (rerouting trains).—The project flood would be of such magnitude that every railroad bridge which crosses Red River would be washed out to and including the one at Index, Arkansas. This condition would necessitate the rerouting of trains until such time as suitable crossings could be erected. It is assumed that the nearest available crossing is at Fulton, Arkansas.

Denison, M. K. T., 10 trains per day at 500 miles each.....	5,000
Carpenters Bluff, K. O. & G., 5 trains per day at 500 miles each.....	2,500
Arthur City, Frisco, 5 trains per day at 350 miles each.....	1,750
Index, K. C. S., 10 trains per day at 50 miles each.....	500
Total miles.....	9,750
9,750 train miles at \$3.15 per mile for 30 days.....	\$921,375
Annual.....	\$18,428

17. Bank caving.—Bank caving occurs when the river is above one-half bankfull stage. From a study of levee practice in the lower river valley, a shift of one mile in thirty years is taken as an average. Regulation of the flow at Denison would probably affect the within-bank stage down to Fulton, Arkansas. Because of the inflow below Deni-

son, the reservoir will only reduce bank caving by 30 percent.

285 miles from Denison to Fulton.

$285 \times 640 \times .30 = 6,080$ acres average annual bank caving.

Reduction, $6,080 \times 30\% = 1,824$ acres at \$30 = \$54,720.

18. *Telephone and power lines.*—The telephone, telegraph, and power lines within the valley would receive considerable damage on account of poles and wire being broken down.

500 miles at \$100, including exchanges and distribution in towns	\$50,000
Loss of business	\$150,000
Total	\$200,000
Annual	\$4,000

19. *Revetments, dikes, and retards.*—Channel stabilization for the protection of the bridges at Arthur City, Index, and Fulton would be damaged or destroyed. The damage is estimated at \$40,000; annual, \$800.

20. *Avulsions.*—The survey made by the U. S. Boundary Commission, in compliance with orders issued by the U. S. Supreme Court in 1925, showed all cutoffs created by avulsions between Denison, Texas, and the Oklahoma-Arkansas state line between the years of 1844 and 1921. Using this record for a basis and extending the area to Index, Arkansas, damage was estimated at:

2,500 acres at \$15	\$37,500
Annual	\$750

21. *Malaria control.*—During the last few years the United States Government, cooperating with the various states and counties, has expended millions of dollars draining water holes, swamps, etc., in order to eradicate the mosquito for the purpose

of controlling malaria fever. This work consists principally of digging ditches, which are silted full and consequently lost whenever a flood occurs.

20 miles ditch at \$750 per mile x 22 counties	\$30,000
Annual benefits	\$6,000

Authorities on the subject claim that better than 90% of the entire population living in the Red River Valley are infected with malaria. Aside from the pain, discomfort, and reduction in efficiency, a real monetary loss results from doctors' bills and the cost of medicine. It is estimated that 9,000 persons should be annually relieved from the above expense at the rate of \$3.00 per capita.

22. *Enhanced property values.*—With the reservoir in operation a large amount of wooded land would be cleared and placed in cultivation. It is estimated that 30% of the timber land in the valley above Index, Arkansas, would be cleared almost immediately and thereby create an enhancement in value of \$25 per acre.

136,000 x 30% x \$25=	\$1,020,000
Annual at 5% =	\$51,000

It is also estimated that approximately 40,000 acres of marginal cleared land would be made more productive with an enhancement in value of \$25 per acre.

40,000 x \$25=	\$1,000,000
Annual at 5% =	\$50,000

23. *Ferries.*—All ferries on Red River between Denison and Fulton would be washed out or damaged materially.

10 ferries at average loss of \$300 each	\$3,000
Annual	\$300

24. Fences.—Drift and washouts would destroy or damage a considerable amount of fence.

1,000 miles at \$50 per mile	\$50,000
Annual	\$1,000

25. Intangible items.—(a) Boll weevil: This insect hibernates in old cotton stalks, brush, and other refuse and prospers in wet places. Statistics indicate that the cotton crop suffers the most from boll weevil after a flood.

(b) Johnson Grass: After the farmers have expended thousands of dollars over a period of years to eliminate this nuisance, a flood will occur and deposit additional seed, making it necessary to start all over again.

(c) Nut Grass: When the seed of this grass has been deposited on a farm by an overflow, the land is virtually ruined, as it is practically impossible to kill it.

(d) Loss to General Business: The merchants in the small towns lying adjacent to the valley, as well as those in the cities, anticipate a large volume of business from the farmer. This business is materially reduced after a major flood.

(e) Diseases: After every disaster from floods the prevention of disease develops into a major problem. The bodies of dead animals, the pollution of wells, and the accumulation of filth all have a tendency to aggravate this condition.

(f) Regulated Flow: After the construction of the Denison Dam a regular flow will be maintained in the entire river. This regulation will eliminate the drying up of the stream bed at certain periods of the year; it will furnish permanent watering

places for cattle throughout the valley, will supply sufficient water for irrigation purposes during drought years, and will reduce the pollution of the stream at the various sewerage disposal outlets.

(g) Benefits from Tourist: With the construction of the Denison Reservoir, various recreational facilities will be established bordering on and in the vicinity of the lake. Because of the comparatively short and mild winters, the climatic conditions are excellent. This condition will, naturally, have a tendency to induce tourists from every section of the country as well as thousands of people from nearby communities in both Texas and Oklahoma.

(h) Confidence of People: Under existing conditions in the valley, people with capital are unwilling to invest their money in developing or improving the land because of the uncertainty and frequency of the floods. Merchants are unwilling to furnish the farmer with more than a pittance for the same reason. As a result of this condition the development of the entire valley is retarded.

(i) Pipe Line Crossings: As the Red River flows through an oil and gas region, particularly in the Louisiana area, there are innumerable pipe lines crossing the river. The Project flood would undoubtedly destroy or damage all of these lines.

It is estimated that the total annual benefits for intangible items will amount to \$150,000.

The annual flood damages are summarized in Table No. 2, and the locations of areas protected are shown on Plate No. 1 of the main report.

TABLE No. 2.—*Flood damages—Summary*

Item	Annual damage
Cotton	701,417
Cottonseed	107,911
Other crops	107,308
Uncultivated land	30,814
1. Crops and uncultivated lands	\$1,007,533
2. Business buildings (buildings and merchandise)	24,000
3. Residence buildings (buildings and contents)	80,000
4. Factories and municipal plants	20,000
5. Streets	9,000
6. Sewers	3,000
7. Highways	17,400
8. Bridges	47,660
9. Railroads	65,000
10. Farm machinery	1,000
11. Livestock	12,500
12. Relief (Care of destitute)	12,000
13. Ginning losses	48,188
14. Loss to railroad companies (hauling cotton)	55,149
15. Loss to railroad companies (routing gains)	18,428
16. Bank caving	54,720
17. Telephone and power lines	4,000
18. Revetments, dikes, and retards	800
19. Avulsions	750
20. Material control	33,000
21. Enhanced property values	101,000
22. Ferries	60
23. Fences	1,000
Subtotal	\$1,616,880
24. Intangible items	150,000
Grand total	\$1,766,880

APPENDIX C

The pertinent portions of the "Definite Project for Denison Dam and Reservoir—Red River" are as follows (pp. 10-14) :

24. *General Considerations Effecting Economic Height of Dam.*—The determination of the economic height of dam involves consideration of the purposes for which the reservoir is to be created, the selected design, and the method of operation of the dam and reservoir for each of the uses for which it is constructed. As the Red River is a silt-bearing stream, it is necessary to allocate dead storage space where silt may be deposited without encroaching upon the desired uses of the reservoir. The mean flow of the river, 6000 c.f.s., for the period of record, is sufficient to provide for the production of hydroelectric energy. However, the variation in total annual runoff, 861,000 acre-feet minimum to 12,640,000 acre-feet maximum with 4,300,000 acre-feet average, requires considerable storage capacity allocated to power in order to regulate the generation of power to meet the market demand. The dead storage, which must be provided for the accumulation of silt, makes available sufficient head for the development of hydroelectric power, so that a failure to develop such power would represent an economic waste. The requirements for flood control can only be met by the reservation of a definite storage space above the power pool for the retention or retardation of floods of such magnitude as may reasonably be expected to

occur within the life of the project. The extent of flood-control storage to be provided is limited by the economic value of the protection afforded. A spillway with crest at the top of the flood-control pool is required to protect the dam from overtopping. Freeboard above the elevation of the top of the estimated maximum surcharge on the spillway is required as additional insurance against overtopping as the result of wave wash and wind. Accordingly, the economic height of dam is determined by adding to the power pool, the elevation of which is determined by the requirements for silt storage, power head, and draw-down, the required flood-control storage plus the surcharge and freeboard necessary to provide against overtopping the dam.

25. *Dead Storage.*—The term "dead storage" applies to the space in the Denison Reservoir for the deposit of silt which would otherwise reduce the efficiency and economic worth of the flood-control storage, since the Red River is a heavy carrier of silt. A study of all available information on the silting of reservoirs in the vicinity and on silt sampling of the Red River at Denison indicates that the siltation of the reservoir will be at the rate of approximately 19,600 acre-feet per year. (See Appendix A.) Due to the possible inaccuracies of the estimated silting rate, the provision of storage sufficient to accommodate the accumulation of silt over the economic life of the project at a rate of 20,400 acre-feet per year, which is in excess of the estimated silting rate by 800 acre-feet per year, is deemed advisable. This provides 1,020,000 acre-feet for dead storage, which allows for an average silting rate of 20,400 acre-feet per year for 50 years, the assumed economic life of the project.

The top elevation of the dead-storage pool for the deposit of silt will be Elevation 587.

26. *Power Storage.*—The amount of storage which can be economically allocated to the production of power depends on the ability of the power market to absorb the power during the useful life of the project. The Division of Power Resources and Requirements of the Federal Power Commission prepared a report in 1937 for use in the studies under the Report of Survey, H. D. 541, on the present and future power markets within reasonable transmission distance of the proposed Denison Dam. A résumé of this report is given in Appendix E. This report indicates that the probable market demand will be for peak power; a demand for which hydroelectric-plants, having large storage, are well adapted. A review of the power market for the Definite Project study confirms the results of the market findings of the Federal Power Commission.

a. *Water Available.*—The mean flow of the Red River during the period of record, 1906 to 1937, inclusive, was 6,025 c. f. s. The water available for power during these years, neglecting evaporation, would have been for minimum year, 861,000 acre-feet; average year, 4,300,000 acre-feet; and maximum year, 12,640,000 acre-feet. Evaporation, during the period of record, would have caused a mean annual loss of 61 inches. See Appendix A.

b. *Power Pool Elevation.*—The Report of Survey, H. D. 541, recommended a power pool elevation of 620, with an operating head from 110 to 85 feet. This provided for an initial installation of 75,000 kw. with 20 percent load factor and an ultimate installation of 125,000 kw. with 11.7 percent load factor. The capacity of these installations

should be absorbed readily by the future demand of the power market. In order to determine the most economical power pool elevation, while still meeting the same market demand, a study was made with power pools at Elevations 620, 617, 615, and 613. These studies showed that fixing the power pool at Elevation 617 was the minimum elevation at which the desired capacity could be obtained from four units. The minimum elevation at which the desired capacity could be produced with five units was Elevation 613. However, the cost of the additional 20-foot conduit, intake structure, and other facilities for a fifth unit exceeded the saving in height of dam by more than \$550,000. Hence, the elevation of the power pool was fixed at Elevation 617, which is the minimum elevation that will permit the development of the installed capacity which can be absorbed by the potential market. The provision of 2,060,000 acre-feet of storage between Elevation 587, top of dead storage pool for the deposit of silt and Elevation 617, top of power pool is chargeable to power.

27. *Flood Control Storage.*—The amount of flood-control storage to be provided is dependent upon the economic returns or benefits which will result from the protection afforded by the flood storage provided. A complete discussion of flood frequency and damages is given in Appendix D. The annual benefits increase very little when floods greater than the 1908 flood, the maximum flood of record, are controlled, while the costs of providing this control increased rapidly. Accordingly, storage to control floods equal in magnitude to the 1908 flood, the largest of record, is all that can be economically justified.

a. *Reservoir operation*.—The operation of the reservoir during floods affects the volume of storage required to control the floods. The maximum outflow from the reservoir, which will not cause damage downstream, has been estimated to be 75,000 c. f. s. See Appendix A. Therefore, four 20-foot diameter conduits with combined capacity, with head at spillway crest, slightly in excess of 75,000 c. f. s. have been provided for flood control. These conduits will be opened whenever the reservoir rises above the maximum power pool, Elevation 617. As the pool increases, the gates will be regulated so that the combined outflow of the power conduits and flood-control conduits does not exceed 75,000 c. f. s. By closing the gates of the outlets as the spillway goes into action and thereby limiting the outflow to 75,000 c. f. s. the reservoir will rise about five feet before the spillway alone discharges 75,000 c. f. s. This would provide 760,000 acre-feet of additional effective flood regulatory storage above the spillway crest. The net effect of the additional 760,000 acre-feet of surcharge storage is to increase the flood regulating capacity of reservoir by 27.5 percent over the fixed capacity below the spillway crest.

b. *Storage allocation*.—In order to determine the amount of storage to allocate for flood control, the 1908 flood was routed through the reservoir with the pool at 617 at the start of the flood. The outlets were assumed to be operated as outlined in the preceding paragraph. The maximum pool elevation was determined to be Elevation 639.5. It was found that the cost of providing complete control of floods greater than the 1908 flood was more than the bene-

fits derived. Therefore, it was decided to provide complete control of that part of the 1908 flood which originated above the proposed dam. This placed the spillway at Elevation 640 and provided 2,745,000 acre-feet for flood control between the maximum power pool, Elevation 617, and spillway crest, Elevation 640.

28. *Surcharge and Freeboard.*—The requirements for power head, dead storage, and power regulations and flood-control storage have fixed the elevation of spillway crest at 640 feet. There remains, in fixing the height of dam, the determination of spillway surcharge for the design flood and the reservoir freeboard with wave action taken into consideration. As an initial step in fixing the Spillway Design Flood, the Computed Spillway Flood, as developed from the maximum storm prediction of the Weather Bureau, was routed through the reservoir with its volume increased by 25 percent as a factor of safety. The reservoir was assumed to have approximately one-half of its capacity for flood storage utilized by a previous flood; which, with the magnitude of the 1908 flood, the greatest on record, would have had to occur not more than 20 days prior to the following flood. This routing gave a maximum surcharge of 25 feet. Assuming a wind velocity of 68 miles an hour perpendicular to the spillway crest occurring at the time of maximum flood crest, an additional eight feet is required for freeboard. These requirements would add 33 feet to the spillway crest in fixing the height of the dam.

29. However, it is believed that the safety factors involved are unduly high for a drainage area of 39,000 square miles. Records

extending over a thousand years for the same size drainage area of the Danube River, fed by ice and snow-covered mountains, indicate a peak discharge of 496,000 c. f. s. While such data are not directly comparable nor conclusive, they do indicate that large drainage areas are not subject to flash flood conditions requiring high factors of safety in prediction. The estimated peak discharge of the 1908 flood, the greatest of record, was 470,000 c. f. s. This discharge was computed on the basis that the river section at the gaging station scoured to bed rock. Overbank flows were also computed through trestle openings and over the railroad embankment. Since no actual measurements were made, this discharge is subject to error. Hence, both volume and peak run-off of the 1908 flood as considered herein, also contain an ample allowance for indeterminate factors. Moreover, over a large drainage area, a flood warning system can be established readily to insure proper regulation of discharge conduits to obtain maximum reservoir efficiency. The U. S. Weather Bureau has submitted as the probable maximum storm, a total average rainfall depth over the basin of 11.3 inches in 96 hours. In developing this storm, the Weather Bureau based the 96-hour estimate on the July 1933 storm which occurred in Louisiana and East Texas. This storm was transposed and oriented over the basin to obtain a maximum average depth of rainfall of 9.95 inches. Therefore, it should be considered that the difference between 11.3 inches and 9.95 inches, represents a safety factor of at least 14 percent, without any consideration being given to the fact that such transposition undoubtedly involves a large unknown safety factor; since the max-

imum storm of record resulted from an average depth of rainfall of only 5.03 inches. The assumption that the reservoir is filled to half capacity by a preceding flood has a large factor of safety; the assumption that a wind velocity of 68 miles an hour may be developed at time of maximum crest also has a large factor of safety, as the storm creating flood conditions over a large drainage area may reasonably be expected to subside before peak discharge reaches the Denison Reservoir. Hence, the maximum probable flood was routed through the reservoir without an arbitrary increase in its volume for safety. This routing gives a maximum surcharge of 21 feet.

30. While the spillway is being designed to carry the maximum possible flood increased by 25 percent for safety; that is, with a surcharge of 25 feet, it is believed that the full requirements for safety against overtopping are met in fixing the height of dam above spillway crest as the surcharge required for this flood without the application of the 25 percent factor of safety. It is therefore recommended that the elevation of crest of dam be fixed at spillway crest 640 feet plus 30 feet; that is, at Elevation 670 feet.

* * * * *

The pertinent portions of Appendix D to the "Definite Project for Denison Dam and Reservoir—Red River" are as follows (pp. 1-3, 7, 10):

1. *Flood Damage.*—Periodic floods in the Red River Basin cause large damage, particularly to crops in the reaches of the river below Denison, Texas. The most damaging floods were those of 1908, 1915, 1935, and 1938; that of 1908 being the largest of record with a peak discharge of 470,000 c.f.s.

The floods are characterized by extensive overflow of the broad flood plains below Denison. Below Index, Arkansas, the flood plains are partially protected by levees which inclose most of the valuable agricultural lands. The limited height of these levees precludes complete protection and occasional overtopping of the levees, such as that caused by the floods of 1935 and 1938, results in considerable damage, largely to crops, in the leveed areas. A description of the larger floods and of the flood damages in the Red River Basin is contained in Report of Survey, H. D. 541.

2. Annual Flood Damages—Report of Survey.—Appendix H, H. D. 541, describes the method of computing annual flood benefits below the proposed Denison Dam. A summary of the annual flood benefits in the Report of Survey is given in Table D-1.

TABLE D-1

Annual flood benefit—report of survey

Project flood:	
Total Crop Benefit	\$17,222,770
Annual Crop Benefit $\frac{1}{30}$ of	17,222,770
	<u>\$244,455.00</u>
Benefit in 30 years:	
1908 (Frequency—30 Years)	\$10,455,352.00
1935 (Frequency—15 Years) $= \$4,256,315 \times 2$	8,512,630.00
	<u>18,967,982.00</u>
Annual $= \frac{1}{30}$ of \$18,967,982	632,266.00
Wooded land, 770,850 acres at 4%	30,814.00
Total annual crop benefit	<u>1,007,585.00</u>
Total annual of other benefits	<u>609,345.00</u>
Intangibles	<u>1,616,880.00</u>
	<u>150,000.00</u>
Total annual benefit	<u>\$1,766,880.00</u>

The Report of Survey frequency study determined that the flood of 1908 would occur once in 30 years, and that of 1935 about once in 15 years. It was assumed that the maximum probable flood (Project Flood) would occur once within the life of the project; that is, once in 50 years. While these assumptions are not entirely rational, it must be realized that the period of record is insufficient to establish a reliable frequency of discharge and that the flood of record did occur once during a period of record of 33 years. The Project Flood (maximum probable flood) of 1,245,000 c. f. s., referred to and used in the Report of Survey, should not be confused with the Computed Spillway Flood described in Appendix A of this Definite Project. Table D-1 shows the Report of Survey method of computing the annual value of crop benefits for the 1935, 1908, and Project Flood. The annual benefits other than crop benefits estimated after a field reconnaissance of the areas and structures which would be effected by the Project Flood with and without the control provided by the Denison Dam were determined to be \$609,345.00. A further benefit of \$150,000.00 was added for intangibles which could not be definitely evaluated (H. D. 541). The resulting total annual damages which would be controlled by the dam and reservoir proposed in the Report of Survey amount to \$1,766,880.00. The extent of control was determined by assuming a dam with spillway crest at 660, power pool elevation at 620, and a total storage capacity of 5,870,000 acre-feet available for flood regulation. Outlets were assumed to discharge at 55,000 c. f. s. during the period of flood regulation.

3. Annual Flood Damage—Definite Project.—The lowering of the spillway crest

from Elevation 660 to Elevation 640 would result in a reduction in the volume of flood storage available for the regulation of the floods in the Red River Basin. This reduction of flood control capacity would effect the regulation only of those floods which are greatly in excess of the flood of 1908. As stated in Appendix A of the Definite Project, the dam and reservoir proposed in this Definite Project will fully regulate all floods of record, including that of 1908. Under the assumed method of operation, all outlets will be closed when the reservoir reaches spillway crest. With the outlets closed, the discharge over the spillway crest (Elevation 640) will not exceed bank capacity downstream of the dam until the surcharge exceeds a depth of 5 feet at the crest. This results in approximately 758,000 acre feet of additional flood regulating capacity between Elevations 640 and 645. In recomputing the value of the flood protection which would be provided by the dam and reservoir with spillway crest at 640, it should be noted that the same degree of protection—hence the same value of control—results for the 1908 and 1935 floods since all floods up to that of the magnitude of 1908 would be fully controlled. Frequencies in the Definite Project analysis are kept at the same values given in the Report of Survey, namely, 30 for the 1908 and 15 years for the 1915 and 1935 floods. Assuming the reservoir at power pool elevation 617 at the commencement of the flood, there will be a reduction in discharge of the maximum probable flood (Project Flood—Report of Survey) of approximately 700,000 c. f. s. This reduction in discharge would prevent the flooding of approximately 520,000 acres of cultivated land. Table D-2 below shows the

Report of Survey method of determining flood benefits which would result from a dam and reservoir with spillway crest at Elevation 640 and 2,745,000 acre feet of regulating capacity as proposed in this Definite Project.

TABLE D-2

Annual benefits—report of survey method of computation for definite project

Project flood:	
Total Crop Benefit	\$14,430,000
Annual Crop Benefit=1/50 of \$14,430,000=	\$289,000
1908 Flood (Frequency—30 years)=\$10,455,352	
1985 Flood (Frequency—15 years)	
\$4,256,315x2=	8,512,630
Annual=1/30 of \$18,967,982=	\$632,266
Wooded land	30,814
Total annual crop benefit	\$952,080
Total annual of other benefits	511,000
	\$1,463,080
Intangibles	150,000
Total annual benefit	\$1,613,080

The total annual value of other benefits in Table D-2 above was determined by a proportionate reduction in the value used in the Report of Survey.

4. It will be noted from Tables D-1 and D-2 that there will be a reduction in the total annual flood benefits of \$1,766,880.00 minus \$1,613,080.00=\$153,800.00, as a result of reduction of the flood regulating capacity of the reservoir through lowering of the spillway crest of the proposed dam from Elevation 660 to 640.

* * * The Red River Basin is largely an agricultural community with approximately 884,030 acres out of 1,672,000 acres under cultivation. With the reduction of flood hazards, a large increase in agricul-

tural pursuits would result since the large acreage now lying dormant or allowed to remain wooded would be thrown into agricultural use with a large enhancement in property values. No credit has been given to this item since its value is almost indeterminable, but none the less, it can be considered a real benefit which bears strongly on the value of the Denison Dam and Reservoir for the control of floods. Relieved of the hazard of flood, the agriculturists in the Red River Basin will be in better position in the competing market to dispose of their agricultural products. Moreover, there will also result greater opportunity for the diversification of crops, with a resulting increase in crop and property values. A benefit which has not been evaluated is the reduction in Mississippi River flood stages by the Denison Dam and Reservoir. Floods in the Mississippi River usually occur in the spring as a result of flood flows out of the Ohio River. The coincidence of flood flows out of the Red River with the Mississippi River spring floods is rare. However, the early summer floods out of the Missouri River occasionally coincide in the Mississippi River with the summer floods out of the Red River. The control provided by the proposed Denison Dam and Reservoir on the Red River summer floods has been estimated to produce a reduction of approximately 0.6 feet at the mouth of Old River on the Mississippi. This reduction, while not substantial with respect to Mississippi flood stages is important when flood crests seriously tax the Mississippi levee system.

* * * * *

14. Effective Flood Control Storage above Spillway Crest.—A safety factor in regard to the reservoir design flood and for the storage

of larger floods is provided by closing the gates when the spillway discharge reaches conduit capacity, as a surcharge of approximately 5 feet over the spillway is required for spillway discharge to reach this amount. This 5 feet of surcharge adds 758,000 acre-feet for flood storage, approximately 28 percent of the design capacity. Moreover, the design flood has been superimposed on a power pool already at maximum elevation. At times, during the operation of the power pool, it will be drawn down to a maximum of 20 feet. A drawdown of only half of this amount would provide an additional storage capacity of 855,000 acre-feet, approximately 31 percent of the design flood storage. Hence, it is clear that the proposed storage is ample in volume to safely control the maximum flood of record, which occurred in 1908, and most probably to control floods of somewhat greater volume.

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SUPREME COURT OF THE UNITED STATES.

No. 832.—OCTOBER TERM, 1940.

State of Oklahoma, *ex rel.* Leon C. Phillips, Governor of the State of Oklahoma, Appellant,

vs.

Guy F. Atkinson Company, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, et al.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

[June 2, 1941.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case involves primarily the constitutionality of the Act of June 28, 1938 (52 Stat. 1215) insofar as it authorizes the construction of the Denison Reservoir on Red River in Texas and Oklahoma.¹

The bill in equity was filed by the State of Oklahoma seeking to enjoin the construction of any dam across Red River within the

¹ The Act provides in part:

"Sec. 4. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: *Provided*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission.

"The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000.

"The Government of the United States acknowledges the right of the States of Oklahoma and Texas to continue to exercise all existing proprietary or other rights of supervision of and jurisdiction over the waters of all tributaries of Red River within their borders above Denison Dam site and above said dam, if and when constructed, in the same manner and to the same extent as is now or may hereafter be provided by the laws of said States, respectively, and all

domain of Oklahoma which would impound the waters of the Red River (or its tributary, Washita River) so as to inundate and destroy any of the lands, highways or bridges belonging to or under the jurisdiction and control of the state or which would obliterate or interfere with its boundaries. The bill also seeks to restrain the institution or conduct in any court in Oklahoma of proceedings to condemn lands for the purpose of the dam or reservoir.²

The bill alleges that Oklahoma will be injured in the following manner by construction of the project: The greater part of the dam will rest on Oklahoma soil and will form a reservoir inundating about 150,000 acres of land, of which 100,000 acres are located in Oklahoma. Of those acres about 3800 are owned by the state. The United States will acquire title to the inundated land. The land owned by the state is used for school purposes, for a prison farm, for highways, rights of way, and bridges. The basin to be inundated is inhabited by about 8,000 Oklahoma citizens. Much of the land is rich soil in a high state of cultivation. Much of it has large potential oil reserves. On some of it there are large producing oil wells and on other parts there are drilling operations and exploration for oil and gas. At least 15,000 acres will be highly productive oil lands and at least 50,000 acres are underlaid with oil and gas. There are thirty-nine school districts and townships in the four counties in which the affected area is located. Those governmental units are largely supported by *ad valorem* taxes. The taking of the 100,000 acres will decrease the taxable property in each of the counties and take virtually

of said laws as they now exist or as same may be hereafter amended or enacted and all rights thereunder, including the rights to impound or authorize the retardation or impounding thereof for flood control above the said Denison Dam and to divert the same for municipal purposes, domestic uses, and for irrigation, power generation, and other beneficial uses, shall be and remain unaffected by or as a result hereof. All such rights are hereby saved and reserved for and to the said States and the people and the municipalities thereof, and the impounding of any such waters for any and all beneficial uses by said States or under their authority may be as freely done after the passage hereof as the same may now be done."

In October, 1939, the State of Oklahoma filed with this Court a motion for leave to file a bill of complaint seeking an injunction against the then Secretary of War from proceeding with the construction of this project. The motion for leave to file was denied by an equally divided court. *Oklahoma v. Woodring*, 309 U. S. 623.

² Appellees are Guy F. Atkinson Co., alleged to be constructing the dam under a contract with the War Department; and Cleon A. Summers and Curtis P. Harris, who as attorneys for the government are alleged to have instituted numerous condemnation suits for the purposes of the proposed reservoir.

all of the taxable property in many of the townships and school districts. Each of these governmental units has a large bonded indebtedness payable from an annual levy of taxes. Inundation of the land will deprive those units of much of the tax revenue, so that many will be practically destroyed and the remainder seriously hampered. Since the state derives much of its revenue from a gross production tax on oil and gas, it will suffer great losses in tax revenues from the inundation of the oil and gas lands. The "annual wealth production" to the citizens of Oklahoma from the lands in the reservoir basin is about \$1,500,000. Aside from such losses and losses from oil revenues and personal property taxation, the net taxable loss to the counties, townships and school districts will be about \$40,000 annually.

It is also alleged that the construction of the dam will be a "direct invasion and destruction" of the sovereign and proprietary rights of Oklahoma in that: the boundary of Oklahoma will be obliterated for approximately 40 miles (see *Oklahoma v. Texas*, 260 U. S. 606); there will be a "forcible reduction of the area of plaintiff as one of the United States"; lands owned by it will be taken; its highways and bridges will be destroyed causing an interruption in communication between various parts of the state; the waters to be impounded belong to Oklahoma but will be taken from it without payment of just compensation; those waters will be diverted from Oklahoma and will be run through turbines located in Texas for the generation of power for sale principally in Texas; the removal of citizens from the 100,000 acres of land will create a "serious social and economic problem", the burden of which will fall on Oklahoma for which no compensation is afforded.

The bill incorporates H. Doc. No. 541, 75th Cong., 3d Sess. (hereinafter called the Report) which contains the War Department's survey and recommendations on the Denison Reservoir and which served as the broad definition of the project which was authorized by the Act of June 28, 1938. The bill alleges that under the statutory scheme flood control and power purposes are "inextricably and inseverably involved". It alleges that, as described in the Report, the first 110 feet of the dam are to be used "solely and exclusively for the development of waterpower", while 40 feet "superimposed" on the power reservoir are to be used "solely and exclusively" for flood control. That is to say, from elevation 510

feet (sea level) to 590 feet there is to be a dead storage pool for waterpower head, from 595 feet to 620 feet there is to be a water power reservoir, and from 620 feet to 660 feet there is to be a flood control reservoir. It is alleged that those purposes are "functionally separate and neither is the incidental or necessary result of the other"; that the same part of the reservoir will not and cannot be used for both flood control and waterpower purposes; and that the power portion of the dam is created at the expense of its utilization for flood control. The bill further alleges that as a result of the modification of the statutory plan set forth in the Report the dam is being constructed so as to provide dead storage for water head from 510 feet to 567 feet, a power pool reservoir from 587 feet to 617 feet and a flood control reservoir from 617 feet to 640 feet. It is alleged that by reason of that modification the reservoir will inundate 3,080,000 acre feet for power and 2,745,000 acre feet for flood control as contrasted to 3,400,000 acre feet for power and 5,900,000 acre feet for flood control under the original plan;³ and that, as a result, the statutory scheme has been changed from one preponderantly for flood control to one preponderantly for water power. It is also alleged that no part of the Red River in Oklahoma is navigable.

³ In this connection it is alleged that under the statutory scheme 75% of the height of the dam is for power and 25% for flood control, and 37% of the acre-feet inundated is for water storage for power and 63% for flood control, while under the modified plan 82% of the height of the dam is for power and 18% for flood control, and 53% of the acre-feet inundated is for water storage for power and 47% for flood control.

The original plan or statutory scheme as set forth in the Report (H. Doc. No. 541, 75th Cong., 3d Sess., p. 45) was described therein as follows:

"The project plan as designed for the combined flood control and power-development scheme with top of dam at elevation 695 is based upon the following allocation of reservoir capacity, the volumes being given in round figures.

"(a) Dead storage.—Stream bed elevation 505 to lower power pool elevation 595, 1,400,000 acre-feet.

"(b) Power pool storage.—Elevation 595 to elevation 620, 2,000,000 acre-feet.

"(c) Flood pool storage.—Elevation 620 to crest of spillway, elevation 660, 5,900,000 acre-feet.

"(d) Detention flood storage.—Storage above the spillway crest, elevation 660, to the maximum reservoir surface reached by the impounded floodwaters, which in the case of the project flood would be 6,400,000 acre-feet for elevation 687."

Under § 4 of the Act of June 28, 1938, the Secretary of War and the Chief of Engineers were authorized to modify the project as it was described in the Report. A modification has been made. Definite Project for Denison Dam &

The bill alleges that the Act under which appellees are proceeding is unconstitutional in that it violates the Tenth Amendment, that it is not within the powers of Congress conferred by Art. I, Sec. 8 of the Federal Constitution, and that since appellees are acting under a void and unconstitutional statute they should be enjoined. By an amendment to its bill, the state of Oklahoma also challenges the constitutionality of § 4 of the Act of October 17, 1940⁴ (Pub. No. 868, c. 895, 76th Cong., 3d Sess.). The amended bill alleges that the project "does not in any way protect or improve the navigable portions of the lower reaches of Red river or of the Mississippi river either by enriching the low water flow . . . as the incidental result of the operation of said flood control and hydroelectric power project, except in the intangible, indirect, inconsequential and unsubstantial way" set forth in the Report; and that such inconsequential and intangible benefits to navigation as may result will flow from the flood control, not the power feature, of the project.

By motions to dismiss the appellees asserted, *inter alia*, that the Acts of Congress so challenged were constitutional and valid. The case was heard by a three judge court (Act of August 24, 1937, c. 754, § 3, 50 Stat. 751, 28 U. S. C. § 380a) which sustained the Act authorizing the project. 37 F. Supp. 93. From a judgment dismissing the complaint and denying the injunction, a direct appeal was taken to this Court.

We are of the view that the Denison Dam and Reservoir project is a valid exercise of the commerce power by Congress.

Reservoir, Red River, Corps of Engineers, U. S. Army (not printed). Those changes were reported to a committee of Congress. Hearings, S. Subcom. on Appropriations, H. R. 6260, 76th Cong., 1st Sess., pp. 25-26, 201. Under the Definite Project (pp. 10-14) the following allocation of reservoir capacity has been made:

- (a) *Dead Storage.* Stream bed elevation 505 to lower power pool elevation 587, 1,020,000 acre feet.
- (b) *Power pool storage.* Elevation 587 to elevation 617, 2,060,000 acre feet.
- (c) *Flood pool storage.* Elevation 617 to spillway crest, elevation 640, 2,745,000 acre feet.
- (d) *Detention flood storage.* Elevation spillway crest, 640, to crest of dam, 670. Appellees on the basis of Definite Project, Appendix A, Plate A-23, place the acre feet at approximately 3,300,000 for elevation 662—the condition which, it is asserted, will exist in case of the maximum probable flood.

⁴ That section provides: "The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses."

6 *Oklahoma ex rel. Phillips vs. Atkinson Co. et al.*

This project is a part of a rather recent chapter in the long history of flood control on the Mississippi River.⁵ The federal government had concerned itself with the problems of navigation and flood control on that river long before⁶ the establishment of the Mississippi River Commission (21 Stat. 37) in 1879. Earlier efforts towards a more comprehensive flood control program on a national scale⁷ were accelerated by the disastrous Mississippi flood in 1927. The agitation and concern over that disaster⁸ led to the enactment of the Flood Control Act of May 15, 1928 (45 Stat. 534), § 10 of which provided that the Secretary of War should submit to Congress "at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and tributaries" That section of the Act also required a report on the effect on flood control of the lower Mississippi to be attained through the use of a reservoir system, the "benefits that will accrue to navigation and agriculture" from the prevention of siltage and erosion, the "prospective income from the disposal of reservoird waters", and, "inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation." Pursuant to that authorization and direction a report (H. Doc. No. 378, 74th Cong., 2d Sess.) was submitted on December 2, 1935, dealing at

⁵ For a summary of various flood control projects on the lower Mississippi, see Report of the Mississippi Valley Committee of the Public Works Administration (1934), pp. 207 *et seq.*; Elliott, The Improvement of the Lower Mississippi River for Flood Control & Navigation (1932), pp. 1-21; Frank, The Development of the Federal Program of Flood Control on the Mississippi River (1930); Beman, Flood Control (1928).

And see H. Doc. No. 541, 75th Cong., 3d Sess., p. 3; Fly, The Role of the Federal Government in the Conservation and Utilization of Water Resources, 86 U. Pa. L. Rev. 274; Kerwin, Federal Water-Power Legislation (1926).

For bibliography, see H. Com. Doc. No. 4, 70th Cong., 1st Sess.

⁶ See Elliott, *op. cit.*, pp. 1-21; S. Ex. Doc. No. 20, 32d Cong., 1st Sess.; S. Ex. Doc. No. 8, 40th Cong., 1st Sess.; H. Ex. Doc. No. 127, 43 Cong., 2d Sess. For the history and work of the Mississippi River Commission, see H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 334-354.

⁷ See, for example, the so-called First Flood Control Act of March 1, 1917, c. 144, 39 Stat. 948.

⁸ H. Rep. No. 1072, 70th Cong., 1st Sess.; H. Doc. No. 90, 70th Cong., 1st Sess.; Hearings, H. Comm. on Flood Control, 70th Cong., 1st Sess., on The Mississippi River and its Tributaries; Hearings, S. Comm. on Commerce, 70th Cong., 1st Sess., on Flood Control of the Mississippi River.

And see Hoover, The Improvement of our Mid-West Waterways, 135 Annals, No. 224, p. 15.

great length with the problems of the Red River and its tributaries and their relationship with the Mississippi.

On June 22, 1936, there was enacted⁹ the Flood Control Act of 1936 (49 Stat. 1570). Sec. 1 of that Act set forth a broad Congressional policy, stating, *inter alia*, that "the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected" and that "destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare." That Act authorized the construction of various flood control projects. By § 7 of that Act the Secretary of War was authorized and directed to continue the investigation of other projects, including the Denison Reservoir, where "opportunities appear to exist for useful flood-control operations with economical development of hydroelectric power whenever sufficient markets to absorb such power become available."

Following the disastrous Ohio River flood in January, 1937, the House Committee on Flood Control requested¹⁰ the Chief of Engineers to submit "comprehensive plans for protective works against floods in the Ohio Valley" and plans "to further insure protection in the Mississippi Valley". He submitted a report pursuant to that direction and recommended the construction of 45 flood-control reservoirs on the tributaries of the Ohio and 24 on other tributaries of the Mississippi, including the Red River.¹¹ As to the proposed Denison Reservoir he stated that it "would remove the threat of the coincidence of a large flood from the Red with a flood in the

⁹ See Hearings, S. Subcom. on Commerce, 74th Cong., 2d Sess., on S. 3531; Hearings, H. Comm. on Flood Control, 74th Cong., 2d Sess., on S. 3531; Hearings, S. Comm. on Commerce, Ex. Sess., 74th Cong., 2d Sess., on H. R. 8455; S. Rep. No. 1963, 74th Cong., 2d Sess.; H. Rep. No. 2918, 74th Cong., 2d Sess.; H. Rep. No. 2583, 74th Cong., 2d Sess.; S. Rep. No. 1662, 74th Cong., 2d Sess.

¹⁰ The resolution is set forth in Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess., p. 1.

¹¹ Com. Doc. No. 1, op. cit., p. 11.

8. *Oklahoma ex rel. Phillips vs. Atkinson Co. et al.*

Mississippi, and would also afford highly desirable protection to the fertile bottom lands in the lower Red River Valley. Besides its flood-control benefits, it has valuable potentiality for power purposes."¹² And he added: "On the Red River . . . investigations indicate that a flood far exceeding any of record is distinctly possible. The Denison Reservoir would prevent such a flood from reaching disastrous proportions in the valley below it."¹³

On March 12, 1938, the Acting Secretary of War transmitted to Congress a report from the Chief of Engineers, United States Army, pursuant to the direction contained in § 7 of the Flood Control Act of 1936. That Report, being the one here involved, (H. Doc. No. 541, 75th Cong., 3d Sess.) recommended the construction of a dam near Denison, Texas, for the combined purpose of flood control and development of hydroelectric power. After hearings¹⁴ Congress passed the Flood Control Act of 1938, here challenged, which authorized,¹⁵ *inter alia*, the Denison project on the basis of the Report and at an estimated cost of \$54,000,000. This was followed by appropriations for the construction work¹⁶ and by the Act of October 17, 1940, also challenged by appellant, declaring the Denison Reservoir to be "for the purpose of improving navigation, regulating the flow of the Red River, controlling floods, and for other beneficial uses."¹⁷ Thus, while the Report spoke of the dam as a "dual purpose" project, Congress did not so limit it but authorized it for multiple purposes.

From this history it is plain that this project, which is part of a comprehensive flood control plan, is designed to control the watershed of one of the principal tributaries of the Mississippi in alleviation of floods in the lower Red River and Mississippi valleys. The

¹² Com. Doc. No. 1, *op. cit.*, pp. 7-8.

¹³ Com. Doc. No. 1, *op. cit.*, p. 8. The Chief of Engineers, United States Army, on February 12, 1935, had submitted a special report to the House Committee on Flood Control, entitled Flood-Control Works in the Alluvial Valley of the Mississippi River, Com. Doc. No. 1, 74th Cong., 1st Sess. And see the Message by President Roosevelt to Congress June 3, 1937, 81 Cong. Rec., pt. 5, 75th Cong., 1st Sess., p. 5280.

¹⁴ Hearings, House Comm. on Flood Control on H. R. 10618, 75th Cong., 3d Sess., pp. 665-686.

¹⁵ Sec. 4 of that Act is set forth in part in note 1, *supra*.

¹⁶ Act of June 28, 1939, c. 246, 53 Stat. 856; Act of June 24, 1940, Pub. No. 653, c. 415, 76th Cong., 3d Sess. See H. Rep. No. 604, 76th Cong., 1st Sess., p. 4; Hearings, S. Subcom. on Appropriations on H. R. 6260, 76th Cong., 1st Sess., p. 18.

¹⁷ See note 4, *supra*.

Red River, sixth in length among rivers in the United States, has one of the largest watersheds in the country, draining an area about 50 per cent larger than New England—an area of 91,430 square miles, of which 38,291 square miles are above the dam site.¹⁸ It rises near the east edge of New Mexico, flows easterly about 850 miles across the Texas Panhandle and between the states of Oklahoma and Texas to Fulton, Arkansas. From there it flows south and southeast some 460 miles and enters the Mississippi at Red River Landing. The site of the Denison dam is 228 miles up the river from Fulton. The contribution which the Red River makes to disastrous floods in its basin and in the lower Mississippi has long been recognized. Huge crop damage, the loss of buildings, bridges and livestock, pollution of fertile fields, the erosion of rich farm lands, bank cavings, interruption of navigation, injury of port facilities, the creation of sand bars in the channels, interruption or stoppage of interstate transportation by rail, truck and motorcar, disease, pestilence and death, relief of the homeless and destitute—all these are now familiar costs of the floods on the Mississippi.¹⁹ And the history of the Red River valley shows that it has long been plagued by such disasters and burdened by their costs.²⁰

¹⁸ Report, p. 17.

¹⁹ As respects the January, 1937 Ohio River flood, the Chief of Engineers reported in April, 1937: "The river rose to a height of 80 feet above low water at Cincinnati, being nearly 9 feet above any flood heretofore of record. The resulting damage was enormous. Practically every community along the entire river suffered heavy loss. Water, electricity, and gas services were discontinued in many cities. More than 500,000 persons were driven from their homes and suffered great discomfort and distress. Highway and railway communications were severed and business and industrial activities were completely disrupted for several weeks. Relief agencies were taxed to the utmost to provide for the flood refugees. Although the direct damages have not yet been fully ascertained, they may conservatively be estimated at more than \$400,000,000. The War Department expended more than \$5,000,000 in relief work and in providing supplies and materials for the flood areas, and approximately \$5,000,000 for emergency work to protect existing structures. The Works Progress Administration provided labor and services. The relief activities of the American Red Cross aggregated more than \$7,500,000. The expenditures of the Federal Government and of the Red Cross for rehabilitation will add greatly to the expenditures already made." Com. Doc. No. 1, H. Comm. on Flood Control, 75th Cong., 1st Sess., p. 3. And see H. Doc. No. 90, 70th Cong., 1st Sess., p. 2; H. Rep. No. 1072, 70th Cong., 1st Sess.; H. Doc. No. 455, 76th Cong., 1st Sess.; H. Doc. No. 91, 76th Cong., 1st Sess.; H. Rep. No. 616, 64th Cong., 1st Sess.; Thomas, Hungry Waters (1937).

²⁰ See H. Doc. No. 378, 74th Cong., 2d Sess., pp. 372 et seq.; Report, pp. 29; 70-71, 84-87, 88, 94.

Floods pay no respect to state lines.²¹ Their effective control in the Mississippi valley has become increasingly a subject of national concern²² in recognition of the fact that single states are impotent to cope with them effectively. The methods of dealing with them have elicited a contrariety of views.²³

The idea of reservoir control on the tributaries of the Mississippi is not new. The Elet report²⁴ to the War Department in 1852 urged the making of surveys for the installation of reservoirs on the Red River and other tributaries which would serve the "double purpose" of "keeping back the floods" and relieving "summer navigation from obstruction, by allowing the surplus so retained, to pass down in the season of low water."²⁵ The emergence in recent years of comprehensive plans for reservoirs in the Mississippi river basin²⁶ marks the development of an integrated system designed not only to alleviate ultimately flood conditions on the Mississippi itself but also to avoid or reduce local flood disasters. A part of the local benefits of flood control is frequently protection of navigation in the tributary itself. That is present here to a degree. It is true that "no part of the [Red] river within Oklahoma is navigable." *Oklahoma v. Texas*, 258 U. S. 574, 591.

²¹ The flood protection afforded by the Denison Reservoir will accrue to four states: two-fifths to Louisiana, and one-fifth each to Oklahoma, Texas, and Arkansas. Report, p. 11. And see Report of the Mississippi Valley Committee of the Public Works Administration (1934).

²² National Resources Board, Report 1934, pp. 26-30, 325-329; National Resources Committee, Drainage Basin Problems and Programs (1936), pp. 73-77; H. Doc. No. 306, Ohio River, 74th Cong., 1st Sess.; S. Rep. No. 891, 64th Cong., 2d Sess.

On forest and flood relationships in the Mississippi river watershed, see H. Doc. No. 573, 70th Cong., 2d Sess., pp. 5, *et seq.* S. Doc. No. 12, 73d Cong., 1st Sess., pp. 299 *et seq.*; pp. 1509 *et seq.*

²³ H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 5-16. And see United States v. Sponenbarger, 308 U. S. 256; H. Doc. No. 90, 70th Cong., 1st Sess.; S. Doc. No. 1094, 62d Cong., 3d Sess.; S. Rep. No. 1662, 74th Cong., 2d Sess.; H. Rep. No. 2583, 74th Cong., 2d Sess.

²⁴ S. Ex. Doc. No. 20, 32d Cong., 1st Sess., pp. 13, 99, *et seq.* And see the review of the ideas for reservoirs contained in Final Report, National Waterways Commission, S. Doc. No. 469, 62d Cong., 2d Sess., App. II; National Waterways Comm., Doc. No. 14, Jan. 1910; H. Doc. No. 1289, 62d Cong., 3d Sess.

²⁵ S. Ex. Doc. No. 20, 32d Cong., 1st Sess., p. 102.

²⁶ See H. Doc. No. 259, 74th Cong., 1st Sess.; Nat. Res. Com., Drainage Basin Problems and Programs (1938); H. Doc. No. 798, 71st Cong., 3d Sess., Vol. 2; H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 101-109; H. Doc. No. 395, 73d Cong., 2d Sess., Pt. 5; H. Rep. No. 1100, 70th Cong., 1st Sess., p. 14; H. Rep. No. 1120, 75th Cong., 1st Sess.

Though appellant alleged that the stream is not now a navigable river of the United States, it has heretofore been authoritatively determined that in years past "the usual head of navigation" was Lanesport, Arkansas, near the Oklahoma boundary. *Id.*, p. 589. At the present time commerce on the Red River is limited to the section below Alexandria, Louisiana, 122 miles above its mouth.²⁷ The fact that portions of a river are no longer used for commerce does not dilute the power of Congress over them. *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123; *United States v. Appalachian Power Co.*, 311 U. S. 377, 409-410. And it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703, 706, 708; *United States v. Utah*, 283 U. S. 64, 90. It is obvious that at least incidentally Congress has done precisely that in this case. Congress was not unmindful of the effect of this project on the navigable capacity of the river. In authorizing it, Congress exercised all the power it possessed to control navigable waters. The Acts in question contain a declaration that one of their purposes is to improve navigation. And the Report clearly shows that the Denison Reservoir will have at least an incidental effect in protecting or improving the navigability of portions of the Red River. The District Engineer reported that "Inasmuch as any new navigation system for the Red River would require flow regulation to furnish a dependable navigable improvement, the Denison Reservoir would be of considerable benefit."²⁸ In his view it would decrease bank caving and silt carriage, substitute "moderately high stages of long durations for high-flood stages of short duration", "furnish more dependable navigable stages especially in the upper portions of the navigation pools";²⁹ and have a "favorable effect on open-channel navigation by reducing flood stages and increasing low-water flows."³⁰ The Division Engineer expressed the view that a "dependable low-water flow of 2,200 to 3,000 cubic feet per second which would result from construction and operation of the power

²⁷ Report, pp. 2-3; and see p. 65.

²⁸ Report, p. 67. And see p. 72.

²⁹ *Id.*, p. 67.

³⁰ *Id.*, p. 68.

project at Denison would be of distinct benefit to the small commerce now developed upon those reaches of the lower Red River which are included in approved navigation projects, and might have a material bearing upon future studies of the Red River with a view to its further improvement. In the present state of knowledge upon this point, it is necessary to classify these benefits among the intangibles. But there is no doubt that a dependable low water supply would simplify, perhaps materially, such future development of the river as may be undertaken.³¹ Thus the effect on the river is tangible, though the value may be uncertain³² since it depends in part on future action of Congress. But that is not our concern.

We would, however, be less than frank if we failed to recognize this project as part of a comprehensive flood control program for the Mississippi itself. But there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river. We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce³³ in the affected areas and have im-

³¹ Report, pp. 79-80. The initial project for improvement of navigation on the Red River was authorized in 1828. Federal expenditures to June 30, 1936, exceeded \$4,000,000. *Id.*, p. 3.

³² As to the intangible benefits from flood control see H. Doc. No. 455, 76th Cong., 1st Sess., entitled Value of Flood Height Reduction from Tennessee Valley Authority Reservoirs to the Alluvial Valley of the Lower Mississippi River; H. Doc. No. 91, 76th Cong., 1st Sess., pp. 22 *et seq.*, entitled The Chattanooga Flood Control Problem; Cooke, On the Relations of Engineering Science to Flood Control, 84 *Science* (Supp.) 40.

³³ As respects benefits from flood height reduction to railroads and highways, see H. Doc. No. 455, 76th Cong., 1st Sess., pp. 21-27; Report, App. H. (not printed) §§ 8-10, 16; H. Doc. No. 378, 74th Cong., 2d Sess., pp. 35-36, 264-265, 372-373; H. Rep. No. 1072, 70th Cong., 1st Sess., pp. 224-228, 246-248; Hearings, S. Comm. on Commerce, Ex. Sess., 74th Cong., 2d Sess., on H. R. 8455, pp. 71-72, 307. For a full account of flood damage to railroads see: Bull., Amer. Ry. Eng. Ass'n (1928) Vol. 29, No. 303, pt. 2.

paired navigation itself. We have recently recognized that "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are . . . parts of commerce control." *United States v. Appalachian Power Co.*, *supra*, p. 426. And we now add that the power of flood control extends to the tributaries of navigable streams. For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. As repeatedly recognized by this Court from *M'Culloch v. Maryland*, 4 Wheat. 316, to *United States v. Darby*, 312 U. S. 100, the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intra-state, affect that commerce.

It is, of course, true that the extent to which this project will alleviate flood conditions in the lower Mississippi is somewhat conjectural. The District Engineer estimated that the Denison project would cause a reduction of 35,000 cubic feet per second in the lower Mississippi in case the May, 1908 flood were repeated; 8,000 cubic feet per second, in case of the May, 1935 flood; and 100,000 cubic feet per second, in case of the estimated maximum probable flood.³⁴ But the Division Engineer pointed out that "the magnitude of the effect would depend upon the size and origin of the concurrent flood in Red River, and upon the basis of reservoir operation."³⁵ In his view, a reduction in flow of 35,000 cubic feet per second in case of such a flood as 1908 "if long enough sustained, would imply a reduction in stage averaging 1.3 feet between Alexandria and Moncks, and a reduction of 0.15 foot in the flow lines of the Atchafalaya Basin and the main river below Old River, provided they were at peak stage. At lower stages the effect would be greater, but less necessary."³⁶ This matter was again reviewed in the Definite Project and the following observations were made:³⁷ "Floods in the

³⁴ Report, p. 74. Cf. H. Doc. No. 798, 71st Cong., 3d Sess., Vol. 2, Annex 18, pp. 1496-1498.

³⁵ Report, p. 86.

³⁶ *Id.*, p. 8.

³⁷ Definite Project, App. D., p. 7. As respects the relation of the Mississippi River as a commerce carrier to flood control, see H. Rep. No. 1072, 70th Cong., 1st Sess., p. 859.

Mississippi River usually occur in the spring as a result of flood flows out of the Ohio River. The coincidence of flood flows out of the Red River with the Mississippi River spring floods is rare. However, the early summer floods out of the Missouri River occasionally coincide in the Mississippi River with the summer floods out of the Red River. The control provided by the proposed Denison Dam and Reservoir on the Red River summer floods has been estimated to produce a reduction of approximately 0.6 foot at the mouth of Old River on the Mississippi. This reduction, while not substantial with respect to Mississippi flood stages is important when flood crests seriously tax the Mississippi levee system."

Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress not the courts. For us to inquire whether this reservoir will effect a substantial reduction in the lower Mississippi floods would be to exercise a legislative judgment based on a complexity of engineering data. It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character. Cf. *United States v. Appalachian Power Co., supra*, p. 424. The nature of the judgment involved is reemphasized if this project is viewed not in isolation but as part of a comprehensive, integrated reservoir system in the Mississippi River basin. A War Department survey in 1935 reveals promising engineering prospects in a system of 157 reservoirs²⁸ throughout the tributaries of the Mississippi. To say that no one of those projects could be constitutionally authorized because its separate effect on floods in the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole. That reveals the necessity from the constitutional viewpoint of leaving to Congress the decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods.

Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the

²⁸ H. Doc. No. 259, 74th Cong., 1st Sess.

commerce power outweigh the costs of the undertaking. *Arizona v. California*, 283 U. S. 423, 456-457; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 329-330. Nor may we inquire into the motives of members of Congress who voted for this project in an endeavor to ascertain whether their concern over the great national loss from soil erosion, the enormous crop damages, the destruction of homes, the loss of life and other like ravages of floods overshadowed in their minds the desirability of protecting the Mississippi and other arteries of commerce. *Arizona v. California*, *supra*, p. 455, and cases cited. It is sufficient for us that Congress has exercised its commerce power, though other purposes will also be served. *Id.*, p. 456.

But Oklahoma points out that the Denison Reservoir is a multiple purpose project,³⁹ combining functionally and physically separate and unrelated purposes. It says that only the top 40-feet of the dam is set apart for flood control and that the lower portions of the dam are designed for the power project and are neither useful or necessary for flood control. It points out from the Report⁴⁰ that a reservoir for flood control only would have a maximum height of 165 feet while a reservoir for flood control and power development would require a maximum height of 185 feet. It therefore earnestly contends that the additional 20 feet in height of the dam requires a very much greater acreage of appellant's domain than would a project for flood control only. And it insists that Congress is without authority to authorize a taking of Oklahoma's domain for the construction of the water power feature of the project.

There are several answers to these contentions. We are not concerned here with the question as to the authority of the federal government to establish on a non-navigable stream a power project which has no relation to, or is not a part of, a flood control project. While this reservoir is a multiple purpose project, it is basically one for flood control. There is no indication that but for flood control it would have been projected. It originated as part of a comprehensive

³⁹ On functional aspects of multiple-purpose dams, see note 45, *infra*.

⁴⁰ P. 42. In this connection, it should be noted that the District Engineer recommended that a dam for flood control only would be at elevation 675, while the multiple purpose dam would be at elevation 695. Report, p. 42. The Division Engineer, however, stated that a restudy indicated "that in the case of the flood-control-only project greater economy would result from narrowing the spillway to 1500 feet and raising the crest of the dam to elevation 691 feet." *Id.*, p. 80.

program for flood control. And the recommendation in the Report that a dual purpose dam be constructed was based "on the assumption that the flood-control project is to be built in any event."⁴¹ See *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 73. Furthermore, it is plain from the Report that the construction of the project so as to accommodate power will increase or augment some of the flood control benefits, including river flow, which would accrue were the dam to be erected for flood control only. Thus, the District Engineer stated: "If it were constructed solely for flood control it would have beneficial effects in reducing floods, decreasing bank caving and silt carriage, and in substituting moderately high stages of long durations for high-flood stages of short duration. If the Denison Reservoir were constructed for the dual purposes of flood control and power development, these beneficent effects would be augmented by those resulting from the regulated power discharge which would increase low-water flows and furnish more dependable navigable stages especially in the upper portions of the navigation pools."⁴²

It is true that the power phase of this project in purpose and effect will carry some of the costs of flood control. The Division Engineer estimated that the annual deficit of \$287,000 from flood control would be offset by an annual profit of \$404,310 from power, leaving an annual net profit of \$117,000.⁴³ But the fact that Congress has introduced power development into this project as a paying partner⁴⁴ does not derogate from the authority of Congress

⁴¹ P. 94.

⁴² Report, p. 67.

⁴³ *Id.*, p. 94.

⁴⁴ As stated in Report of the Mississippi Valley Committee of the Public Works Administration (1934), p. 23:

"Navigation is particularly benefited by reduction of flood crests, and all of the possibilities of water use are improved by increases in flow at extreme low stages. Under certain favorable circumstances it may be possible to release water from flood control reservoirs to satisfy requirements for hydroelectric power development at the dam, or to regulate the flow down stream to the advantage of a variety of water uses. In such cases equitable distribution of costs among the several purposes served may even sufficiently reduce the costs chargeable to flood protection to warrant the construction of flood-control reservoirs which could not be justified for flood protection alone."

And see Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. Pa. L. Rev. 274, 286 *et seq.*; Message by President Taft, August 24, 1912, 48 Cong. Rec., pt. 11, 62d Cong., 2d Sess., p. 11796, vetoing a bill authorizing the building of a dam across Coosa River, Alabama, by a private company; S. Doc. No. 246, 64th Cong., 1st Sess.

to construct the dam for flood control, including river flow. The power project is not unrelated to those purposes.⁴⁵ The allocations of cost⁴⁶ and storage between power and flood control, however significant for some purposes, cannot conceal the flood control realities of this total project. Cost of the power project, roughly speaking, was determined by the cost of the multiple purpose dam less the cost of a dam for flood control only.⁴⁷ On that basis the Report points out that the cost of storage for flood control only (5,800,000 acre-feet) is about \$6.60 per acre-foot, while the cost of the 3,500,000 acre-feet in the so-called power pool is around \$2 per acre-foot, exclusive of the cost of the powerhouse and appurtenant construction.⁴⁸ In this connection, the Definite Project states that "amount of storage which can be economically allocated to the production of power depends on the ability of the power market to absorb the power during the useful life of the project."⁴⁹ But the Division Engineer observed that "In actual operation of the dual-purpose project this cheap storage would be dedicated to flood control, whereas in the financial set-up it is credited to power."⁵⁰ It is clear from the Report⁵¹

⁴⁵ On the relationships between the multiple purposes of water control see Report of the Mississippi Valley Committee of the Public Works Administration (1934), pp. 20-24; Alvord & Burdick, *Relief from Floods* (1918), pp. 28-36; Clemens, *The Reservoir as a Flood-Control Structure* (1935), 100 Am. Soc. of Civ. Engrs. 879; H. Doc. No. 1792, 64th Cong., 2d Sess., p. 5.

And see Nat. Res. Com., *Water Planning* (1938); Nat. Res. Com., *Energy Resources & National Policy*, (1939), p. 306.

⁴⁶ Cf. Hamilton, *Cost as a Standard for Price*, 4 Law & Cont. Problems (1937), 321, 325.

⁴⁷ Report, pp. 60, 64.

⁴⁸ Report, p. 82.

⁴⁹ Definite Project, p. 11. The District Engineer stated in the Report, p. 32: "A hydroelectric development alone at the Denison Reservoir site could not absorb all of the reservoir costs and produce power in competition with that from fuel-consuming plants. However, the combination of flood control and power development in the Denison Reservoir presents certain promise of favorable economic feasibility. Although this reservoir would approach economic justification if constructed exclusively for flood control, the income from power developed in conjunction with flood control would in part absorb this deficiency since the value of the available power would be somewhat in excess of its cost. It is apparent that the relative amounts of annual return, flood benefits, or power revenues, from each of the two functions of a dual-purpose development are quantitatively dependent upon the manner in which storage potentialities of the site are apportioned between these two functions. It is believed, however, that an increased allocation of such storage to flood control at the expense of power would not materially alter the above conclusion except perhaps to show economic deficiencies for both phases of the development."

⁵⁰ Report, p. 82.

⁵¹ Id., pp. 45-46.

and the Definite Project that the bottom pool of dead storage is designed to take care of the deposit of silt "which would otherwise reduce the efficiency and economic worth of the flood control storage."⁵² At the same time it will effectively provide waterpower head. And so far as the power storage is concerned, the Definite Project makes plain that it is functionally related to the broad objectives of flood control. The operation of the reservoir will involve a consideration of its multiple purposes.⁵³ Its operation in periods of drought so as to regularize the flow below the dam;⁵⁴ the reduction in reservoir outflow in case of floods down the valley; the increase of the outflow, in case of impending floods from above the dam, to the maximum "bank full capacity downstream of the dam, so that the maximum amount of flood control storage will be available when the peak of the flood reaches the reservoir, thereby reducing the peak outflow of the reservoir to a minimum"⁵⁵—these are ample evidence that the power features and the flood control features of the dam, including river flow, are not unrelated. They demonstrate that in operation of the dam the several functions will be interdependent and that the conflicts between the respective requirements of flood control and power development are here more apparent than real.⁵⁶ They show that this is nonetheless a flood control project which will "fully control the maximum flood of

⁵² Definite Project, pp. 10-11; App. F., p. 5. And see Hearings, H. Comm. on Flood Control, 75th Cong., 3d Sess., p. 641.

⁵³ Definite Project, p. 26.

⁵⁴ *Id.*, App. F., p. 7; Report, p. 67.

⁵⁵ Definite Project, pp. 26, 12.

⁵⁶ It was noted in Nat. Res. Com., Energy Resources & National Policy (1939), p. 276, that:

"The most obvious and most discussed conflict of purpose in use of water resources relates to flood control and power. Since flood control is of great urgency in so many basins, one may appear to demolish all concept of wisdom in production of water power by the pat observation that an empty reservoir will not run turbines and a full reservoir will not catch floods. With respect to a particular reservoir, the observation is in point, but it is not thereby conclusive. That one reservoir might be reserved for flood control and another on the same stream used for power probably stumps no one. Neither should it stump anyone that part of a single reservoir be reserved for flood and part be used for power. Indeed, it would often cost less to provide flood-control space in the same reservoir with power space than to build a separate reservoir. And it should not be forgotten that storage to prevent the ordinarily low flow of dry seasons is itself flood prevention in that better sustained ordinary flow tends to maintain clear channels. If the conflict really were irreconcilable, we should be forced to abolish private water-power plants on every stream system requiring flood control. If private power and public flood control may harmonize, one may believe the same of public power and public flood control."

And see The Norris Project (1940), ch. 8.

record",⁵⁷ though power, it is hoped, will pay the way. Whether the work of flood-control, including river flow, would be better done by a dam of one design or another is for Congress to determine. And, as we have said, the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance does not invalidate the exercise of the authority conferred on Congress. *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 275, 276; see *In re Kollock*, 165 U. S. 526, 536; *Weber v. Freed*, 239 U. S. 325, 329-330; *Arizona v. California*, *supra*, p. 456.

The Tenth Amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby*, *supra*, p. 124, and cases cited. Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state.⁵⁸ *United States v. Appalachian Power Co.*, *supra*, p. 428. The fact that land is owned by a state is no barrier to its condemnation by the United States. *Wayne County v. United States*, 53 Ct. Cls. 417, *aff'd* 252 U. S. 574. There is no complaint that any property owner will not receive just compensation for the land taken. The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the federal government of its power of eminent domain is no barrier to the exercise of that power. "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield." *Florida v. Mellon*, 273 U. S. 12, 17. Nor can a state call a halt to the exercise of the eminent domain power of the federal government because the subsequent flooding of the land taken will obliterate its boundary. And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. *United States v. Rio Grande Dam & Irrigation Co.*, *supra*, p. 703; *New Jersey v. Sargent*, 269 U. S. 328, 337; *Arizona v. California*, 298 U. S. 558, 569; *United States v. Appalachian Power Co.*, *supra*.

Affirmed.

⁵⁷ Report, p. 88.

⁵⁸ The government concedes that there will be no loss of political jurisdiction over the lands taken except with the consent of the state. Art. 1, § 8, clause 17 of the Constitution.

